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In The

# Supreme Court of the United States

October Term, 1996

LISA ANNE VARNER,

*Respondent,*

*vs.*

NATIONAL SUPER MARKETS, INC.,

*Petitioner.*

*Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit*

## PETITION FOR WRIT OF CERTIORARI

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115 pp

## QUESTIONS PRESENTED

I. There is a conflict between the Eighth Circuit's decision in this case and the Fourth Circuit's decision in *Austin v. Owens-Brockway Glass Container, Inc.*, 78 F.3d 875 (1996) concerning whether a complainant of sexual discrimination must follow a mandatory grievance and arbitration procedure bargained for in her collective bargaining agreement before filing suit against her employer for Title VII damages.

II. There is a conflict between the Eighth Circuit in the present case and the Third Circuit in *Boutin v. BMW of North America* concerning whether an employer is liable for the sexually harassing acts of a non-supervisory employee, when the employer maintains an express policy prohibiting sexual harassment and expressly prescribes procedures to be followed for reporting complaints of sexual harassment, and the victim chooses not to follow the reporting policy. In *Meritor v. Vinson*, this Court held that an express policy which encourages victims to come forward and report their complaints of harassment might insulate an employer from liability, and this case presents the court with the opportunity to expound upon this potential defense for employers.

## LIST OF THE PARTIES

The parties to the proceeding before this court are:

Petitioner: The Petitioner is correctly identified in the caption except that National Super Markets, Inc., is dissolved and in the process of winding up its affairs and its its parent company is National Tea Company, Inc.

Respondent: Lisa Anne Varner

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Petitioner National Super Markets, Inc. respectfully requests this Court to issue a writ of certiorari to review the final decision of the United States Court of Appeals for the Eighth Circuit, entered on September 9, 1996.

## OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit entered on September 9, 1996 is reprinted as Appendix 1a-11a. The opinion of the United States District Court for the Eastern District of Missouri entered on August 23, 1995, is reprinted as Appendix 12a-27a.

## STATEMENT OF JURISDICTION

The Petition for Writ of Certiorari seeks review of a decision of the United States Court of Appeals for the Eighth Circuit filed on September 9, 1996. This application was submitted no later than 90 days from the aforesaid date. Motions for Rehearing were not filed.

Jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1) in that this petition seeks review of a final judgment rendered in a civil case by the United States Court of Appeals for the Eighth Circuit.

## STATEMENT OF THE CASE

Lisa Anne Varner ("Varner") claims that National Super Markets, Inc. ("National") is liable under the Federal Civil Rights Act, 42 U.S.C. § 2000(e), *et seq.* and the Missouri Human Rights Act, Mo. Rev. Stat. § 213.010, *et seq.*, for sexual discrimination arising out of the conduct of a non-supervisory co-employee Robert Edmiston ("Edmiston"). Varner testified that Edmiston harassed her by making four offensive comments and that on two occasions Edmiston made physical contact with her in an offensive manner. Edmiston's acts occurred while he and Varner were on duty as employees of National.

Varner testified that she "chose" not to inform National of Edmiston's ongoing alleged harassment. Rather, Varner chose to first voice and seek reparation for her grievances by filing a Complaint with the Equal Employment Opportunity Commission, despite the fact that Varner had two available means of informing National of her complaints and requesting amelioration of her working conditions: (1) the Collective Bargaining Agreement grievance process; and (2) National's written policy against sexual harassment. Varner failed to avail herself of either of the prescribed means for informing National of her complaints. She withheld her grievances from National, but announced them to her boyfriend, school counselor, parents, the police and to the E.E.O.C., rather than to her employer.

**A. The Collective Bargaining Agreement**

The alleged discriminatory acts occurred between September, 1990 and November 22, 1991, during which time there was a Collective Bargaining Agreement ("Agreement") in effect between National and U.F.C.W. Local 655 ("Local 655"). *See* relevant excerpts of the Collective Bargaining Agreements at App. 28a-57a. Varner, a retail grocery clerk, was a member of Local 655. The Agreement contains negotiated, mandatory procedures for resolving all employee complaints concerning working conditions. The mandatory process commences with the filing of an employee grievance and culminates in binding arbitration if the parties are unable to settle their dispute. Complaints of sexual discrimination are specifically mentioned in the Agreement as being covered by this mandatory grievance and arbitration procedure.

*1. Varner Failed to File a Grievance Regarding Her Hostile Working Conditions*

The employment relationship between Varner and National was governed by the Agreement between National and her exclusive bargaining agent, Local 655. Article 1, § 1.1 of the

Agreement provides that "[t]he union shall be the sole and exclusive bargaining agent of all employees . . ." (App. 31a, 47a).

Varner testified that during work she was subjected to four offensive remarks/gestures and one offensive touching by her co-worker Robert Edmiston prior to the final incident on November 22, 1991, which led to Edmiston's employment termination. Varner never filed a union grievance against National concerning Edmiston's offensive behavior and the attendant hostile work environment. Varner never consulted or spoke with the union shop stewards or any of the store management prior to or after the final November 22 incident. Varner totally failed to avail herself of any of the remedies that were afforded to her under the Agreement; remedies that were bargained for and agreed to by both National and Local 655.

*2. Applicable Provisions of the Collective Bargaining Agreement*

As a union employee, the terms and conditions of Varner's employment are set forth in the Agreement. Relevant sections of the Agreement are: (1) the Introductory paragraph (indicating intent of parties to provide channel of communication); (2) Section 2.5 (agreement that there will be no sex discrimination); (3) Article 3, Management Rights (specifying National's right to establish rules covering the operation of the store); (4) Article 4 (mandatory grievance and arbitration procedures); and (5) Section 5.2 (Union's promise to uphold National's rules). (App. 31a, 35a, 37a-40a, 47a, 51a, 53a-56a).

In exchange for a mutually beneficial labor agreement, Local 655 and National agreed upon a procedure for resolving disputes which arose concerning working conditions, employer rules and regulations and employee discrimination based upon sex. Relevant excerpts of this Agreement are contained in Appendix 28a-57a. The Agreement provides that the parties "shall" settle their disputes by means of a series of four specific

steps, each later step being necessary only if the former step failed to reconcile the grievance. The ultimate resolution of any disputes about which the parties could not mutually agree to settle, is a final and "binding" arbitration, to be conducted by an arbitrator who is selected by the parties.

Additionally, Article 4 of the Agreement requires that all "grievances must be taken up promptly. No grievance will be considered, discussed or become arbitrable which is presented later than seven (7) days after such has happened." (App. 39a, 55a, § 4.5). Section 4.7 provides that employee "grievances will be discussed *only* through the outlined procedures . . ." (App. 39a, 55a).

Varner circumvented all of the prescribed steps for settling her complaints with National. Varner admitted that she made a "choice" not to contact National to report any of the incidents. Varner even failed to discuss her complaints with National after she summoned the police to the store to arrest Edmiston, choosing instead to inform National to direct any questions to her attorney.

The grievance and arbitration provisions in the Agreement are mandatory. The first paragraph of Article 4 provides that the parties "shall" make an earnest effort to settle any complaints through Steps 1 through 4 of Article 4. Further, Article 4 provides that if the parties are unable to settle the dispute, the parties "shall" be bound by an arbitrator's decision. The word "shall" is used throughout Article 4 to indicate that the process is mandatory.

The instructions given to the jury in the present case required that Varner prove that the alleged discrimination affected a "term, condition or privilege of her employment" and that the sexual harassment experienced was "sufficiently severe or pervasive to alter the conditions of the employment and create an abusive,

hostile or offensive working environment." The allegation that Varner was forced to work in a hostile environment is a complaint that involves her working conditions, and, therefore, is subject to the agreed upon contract terms which prescribe a means for remedying such unacceptable working conditions.

Varner claims that her working conditions subjected her to sexual discrimination, via the harassment. Both Local 655 and National consider a sexually discriminatory work environment to be an unacceptable working atmosphere, and as a result, inserted into the labor Agreement, § 2.5 which provides that the "Employer and the Union agree" that there shall be no "discrimination against any employee on account of . . . sex . . ." (App. 35a, 51a).

The Local 655 shop stewards, who are on the premises of Varner's store, testified that: (1) they are both very active shop stewards who work in the same store as Varner; (2) sexual discrimination and harassment are subjects covered by the Collective Bargaining Agreement; (3) all employees were given a copy of the Agreement; (4) the shop stewards made sure that; the policy prohibiting sexual harassment was posted in the store, (5) they have both attended seminars on sexual harassment; (6) the shop stewards are available twenty-four hours a day to receive employee grievances and questions; and (7) the grievance procedures outlined in the Collective Bargaining Agreement apply to complaints of sex discrimination. In summary, the testimony of the union representatives was that they agree with National that complaints of sex discrimination should be processed through the grievance and arbitration procedure set out in the Collective Bargaining Agreement.

National's Director of Human Resources and Labor Relations testified that the prohibition of sex discrimination contained in the Agreement, was negotiated with and agreed to by Local 655, and that Local 655 has the power to process grievances on this topic and further that the union has agreed to uphold the rules of the employer.

## B. National's Policy Against Sexual Harassment

National's written store policies provide a code of conduct for employees which encourages a professional working environment. National had a written policy against sexual harassment during Varner's employment ("the Policy"). The Policy sets out the procedure for filing a complaint of sexual harassment, and the method to be undertaken by the employer to investigate and resolve the complaint. National reissued its Policy against sexual harassment, entitled "Sexual Harassment Policy", on August 16, 1990 (App. 64a-65a) and January 1, 1991 (App. 67a-68a). Appendix 66a and 69a set forth the procedure for handling complaints of sexual harassment. There were no substantive changes made to National's policy against sexual harassment during Varner's employment at National.

### *1. Varner Did Not Follow National's Policy Against Sexual Harassment*

To discourage the occurrence of sexual harassment and to encourage employees to file complaints if they experience sexual harassment, National undertook several measures to inform its employees of the existence of the Policy.

1. *Varner's Employee "Welcome" Handbook*: Varner was given a National Employee "Welcome" Handbook during her new-employee orientation, which occurred only a few months before the alleged harassment began. National's Sexual Harassment Policy is contained in the handbook. (App. 61a). Varner was told during orientation to familiarize herself with the contents of the employee handbook. (App. 62a).

2. *Varner's Associate Acceptance Record*: During new-employee orientation, Varner also signed the "Associate Acceptance Record". (App. 62a-63a). In this record, Varner agreed to familiarize herself with the contents of the "Welcome" handbook, seek verification and clarification of policies and

procedures when necessary, and comply with National's policies and procedures. Varner accepted responsibility to keep informed of any changes in National's policies or procedures. (App. 62a-63a). By this evidence, Varner admitted that she knew or should have known of National's policy against sexual harassment and its reporting procedures.

3. *Policies Posted in Employee Breakroom*: Former National employees testified at trial that National's "Policy" against sexual harassment, which contained the procedures for reporting complaints, was posted on the employee bulletin board in the employee breakroom. Chris Pilch (Varner's boyfriend and co-worker) and Varner were the only witnesses who denied that the Policy was posted.

4. *Seeking Clarification Pursuant to Agreement*: Testimony at trial established that employees can also obtain information about National's policies by asking management, union representatives, shop stewards, co-workers or by calling the main office.

2. *Varner Chose Not to Report Any Complaints of Sexual Harassment to National*

Varner never complained to National pursuant to National's Policy, nor her union pursuant to the grievance process, in an attempt to cease the hostile work conditions that she says she experienced in 1991. Varner made a "choice" not to complain to National or her union about Edmiston's acts.

Pilch claimed to have told the store manager, Curtis Mason, about Edmiston's first physically offensive act. This testimony was disputed at trial. Mason testified that Pilch told him that Edmiston had made an "off-color" remark to Varner. Nevertheless, Varner understood through Pilch that she should report the incident to Mason if she wished to lodge a complaint. Varner did not report Edmiston's comments or the first physical

act to Mason even though she saw Mason on several occasions between the two incidents. Varner did not report any of Edmiston's comments or acts to anyone at National, other than her boyfriend.

During the several months after the first physical contact, Pilch told Varner to call Mason and report the incident. Although Pilch could not recall how many times he told Varner to contact Mason, Pilch knew that National would take no action until Varner contacted Mason. Pilch and Varner decided not to report Edmiston's comments or the first physical act. Pilch could not recall if, after the second physical act several months later, Pilch told Varner to again report the incident(s) to Mason.

Although Varner did not report Edmiston's actions to National, she told her parents, Pilch, her counselor, and the police about Edmiston. In fact, Varner called the National store that day after the second physical act and confronted Edmiston, yet she still did not inform National's management of her complaints.

**C. The Basis For Federal Jurisdiction In The Court Of First Instance**

Jurisdiction of the District Court is founded on 28 U.S.C. § 1331 and 42 U.S.C. § 2000(e). Varner filed her four count complaint of law in state court alleging a cause of action under 42 U.S.C. § 2000(e), *et seq.* and Civil Rights Act of 1991. National removed the case to the United States District Court pursuant to Title 28 U.S.C. §§ 1443, 1141(b) and 1441(c) and 28 U.S.C. § 1331.

The jury rendered its verdict against National on both the Missouri Human Rights Act and Title VII claims. By Order dated August 23, 1995, the District Court denied National's Motions for Judgment as a Matter of Law filed pursuant to Federal Rule of Civil Procedure 50(b). (App. 12a-13a, 24a-25a). National's

Notice of Appeal was timely filed on September 21, 1995. National appealed the District Court's judgment pursuant to 28 U.S.C. § 1291.

## REASONS FOR GRANTING THE WRIT

### I.

### THERE IS A CONFLICT BETWEEN THE FOURTH AND EIGHTH CIRCUITS CONCERNING WHETHER A COMPLAINANT OF SEXUAL DISCRIMINATION MUST FOLLOW A MANDATORY GRIEVANCE AND ARBITRATION PROCEDURE BARGAINED FOR IN HER COLLECTIVE BARGAINING AGREEMENT BEFORE FILING SUIT AGAINST HER EMPLOYER FOR TITLE VII DAMAGES.

The United States Courts of Appeals for the Eighth and the Fourth Circuit have rendered conflicting decisions as to whether an employee must exhaust her remedies under a collective bargaining mandatory grievance and arbitration procedure before bringing a lawsuit against her employer for Title VII damages. This Court should resolve the conflict because of the importance of the question and because, if unresolved, the issue will interfere with the stability and progress of labor relations between employers and employees under the Labor Management Relations Act and under the Civil Rights Act of 1964 and the Civil Rights Act of 1991.

### A. The Conflict Between The Fourth And Eighth Circuits

In *Austin v. Owens-Brockway Glass Container, Inc.*, the Appellate Court, affirming the District Court's grant of summary judgment, held that an employee must follow the grievance procedure established by the collective bargaining agreement prior to filing her Title VII cause of action. *Austin*, 78 F.3d 875, 885 (4th Cir. 1996). The employee in *Austin* has filed a Petition

for Writ of Certiorari, which is pending before this Court. The *Austin* court underwent extensive analysis before reaching this holding, including discussion of *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 111 S. Ct. 1647, 114 L. Ed. 2d 26 (1991), the Civil Rights Act of 1991 and its legislative history, the National Labor Relations Act, the "Steelworkers' Trilogy", and cases decided in other federal jurisdictions.

In the present case, the Eighth Circuit held contrary to the *Austin* decision. The Eighth Circuit ruled that an employee did not need to comply with any of the collective bargaining grievance procedures before filing a Title VII lawsuit in Federal Court. The Eighth Circuit's discussion of this issue does not contain the same in-depth analysis as the Fourth Circuit's *Austin* decision. As authority for its decision, the Eighth Circuit cited exclusively to the Supreme Court's decision in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 49 (1974) and *Stacks v. Southwestern Bell Yellow Pages, Inc.*, 27 F.3d 1316, 1326 n. 3 (8th Cir. 1994) without any further analysis. The Eighth Circuit did not discuss *Austin*, decided almost six months earlier, although Petitioner cited *Austin* in its appellate briefs.

Relying upon this Court's holding in *Gardner-Denver*, the Eighth Circuit held:

> [T]he United States Supreme Court has held that the pursuit of a claim through grievance and binding arbitration under a CBA [Collective Bargaining Agreement] does not preclude a civil suit under Title VII, (citation omitted), and we believe the same reasoning applies to a plaintiff who has chosen not to participate in the grievance procedure.

The Eighth Circuit concluded that the District Court did not err in denying National's Motion for Judgment as a Matter of Law.

The relevant facts in *Austin* are substantially similar to this case. Austin filed suit alleging violations of Title VII (sexual discrimination) and the Americans with Disabilities Act. The terms, conditions, and privileges of Austin's employment, like Varner's, were bargained for and identified in her collective bargaining agreement. The collective bargaining agreements of both Austin and Varner specifically identify allegations of sex discrimination as matters that are subject to a mandatory grievance and arbitration process. Hence, like Varner, Austin was a party to an agreement to submit her statutory sexual discrimination claims to arbitration. Both claimants failed to follow the grievance-arbitration process prescribed by their collective bargaining agreements.

The *Austin* court determined that the language contained in Austin's collective bargaining agreement showed that Austin was a party to a "voluntary agreement which has explicitly agreed to the arbitration of her statutory claims." *Austin*, 78 F.3d at 883, n. 2. The terms of Austin's collective bargaining agreement which the Fourth Circuit relied upon in reaching its conclusion are substantively identical to those contained in Varner's Agreement. In *Austin*, the collective bargaining agreement reads:

> The Company and the Union will comply with all laws preventing discrimination against any employee because of race, color religion, sex, national origin, age, handicap, or veteran status.

*Austin*, 78 F.3d at 879.

Varner's Agreement, § 2.5 under "Union Security", reads:

> The Employer and the Union agree that there shall be no discrimination against any employee . . . because of race, religion, color,

> creed, national origin, sex or age in accordance with existing law.

(App. 35a, 51a).

Austin and Varner's Agreements both contain a mandatory grievance and arbitration procedure. *See Austin*, 78 F.3d at 880 and Varner's Collective Bargaining Agreement, Article 4 App. 37a-39a, 53a-55a). And, as in *Austin*, Varner's Agreement at Article 4.3 provides that "[t]he decision of the arbitrator shall be binding on both parties." *See* App. 39a, 55a, Article 4.3, and *Austin*, 78 F.3d at 880.

**B. The Conflict Between The Circuits Creates Uncertainty Amongst Employers And Unions As To Whether Bargained For Grievance Procedures Are Applicable To Employee Complaints Of Sexual Discrimination, Sexual Harassment, And Hostile Working Conditions**

The working conditions of union employees are a mandatory subject of collective bargaining. *See* Labor Management Relations Act, 29 U.S.C. § 158(d). (App. 72a). The Labor Management Relations Act mandates that employers bargain in good faith with unions on issues involving "wages, hours, and other terms and conditions of employment." *Id.* The Supreme Court in *Ford Motor Co. v. NLRB*, 441 U.S. 488 (1979) held that an issue is a mandatory subject of bargaining if the matter is "plainly germane to the working environment . . ."

The Eighth Circuit's application of *Gardner-Denver* to the present case results in the erosion of the well-established principle of labor law: employees, unions, and employers are bound to follow the bargained for grievance process before filing suit and that such a rule promotes harmony in the workplace. The Labor Management Relations Act embodies a strong federal policy favoring compulsory arbitration of disputes concerning application or interpretation of collective bargaining agreements.

*Textile Workers Union of America v. Lincoln Mills*, 353 U.S. 448, 455 (1957). A critical element of this federal policy is the requirement that an employee exhaust grievance and arbitration procedures prior to filing a lawsuit. *Republic Steel Corp. v. Maddox*, 379 U.S. 650 (1965). In *Republic Steel*, the United States Supreme Court reiterated that:

> [F]ederal labor policy requires that individual employees wishing to assert contract grievances must attempt use of the contract grievance procedure agreed upon by the employer and union as the mode of redress.

*Id.* at 652.

> . . . unless the contract provides otherwise, *there can be no doubt that the employee must afford the union the opportunity to act on his behalf.* Congress has expressly approved contract grievance procedures as a preferred method for settling disputes and stabilizing the "common law" of the plant.

*Republic Steel*, 379 U.S. at 652, *citing* Labor Management Relations Act, 29 U.S.C. §§ 171(a) and (c) and 29 U.S.C. § 173(d). (App. 73a-74a).

This Court in *Republic Steel* further opined:

> . . . A contrary rule which would permit an individual employee to completely sidestep available grievance procedures in favor of a lawsuit has little to commend it. In addition to cutting across the interests already mentioned, it would deprive employer and union of the ability to establish a uniform and exclusive method for orderly settlement of

> employee grievances. If a grievance procedure cannot be made exclusive, it loses much of its desirability as a method of settlement.

*Republic Steel*, 379 U.S. at 652.

Contrary to the Eighth Circuit's finding in the present case, Congress intended Title VII to "supplant" rather than "supplement" other remedies for employment discrimination. *Knox v. Wheeling Pittsburgh Steel Corp.*, 899 F. Supp. 1529, 1539 (N.D. W. Va. 1995). Title VII makes it unlawful for an employer to "discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. §§ 2000e-2(a)(1) and (2). (App. 71a). Requiring an employee who is a party to a voluntary agreement to submit his statutory discrimination claim to a grievance-arbitration procedure furthers the purpose of Title VII because it provides an alternative remedy to the employer and employee to enact prompt remedial measures to end the discrimination.

Congress' intent to have federal litigation of employment discrimination supplement rather than supplant the collective bargaining process is exemplified in its enactment of § 118 of the Civil Rights Act of 1991. In § 118, Congress expressed its confidence in and encouragement of arbitration as a desirable means of resolving complaints of discrimination:

> § 118 Alternative Means of Dispute Resolution.
>
> > Where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including settlement

> negotiations, conciliation, facilitation, mediation, factfinding, minitrials and arbitration, is encouraged to resolve disputes arising under the Acts or provisions of Federal law amended by this title. 42 U.S.C. § 2000E-2, Pub. L. 102-166, 105 Stat. 1071.

(App. 72a).

Grievance procedures in labor contracts are designed to keep problems from escalating. The grievance process is an expedient and cost effective method of resolving complaints of discrimination. For example, if Varner had filed a complaint after Edmiston's first offensive remark, allowed her employer to investigate and deal with the situation appropriately, it is highly unlikely that there would have been any further incidents of harassment. More specifically, National could have investigated the complaint, spoken with each of the concerned employees, counseled either or both employees, encouraged or required that one or the other seek professional counseling, offered transfers out of their respective work departments or store, offered leaves of absence, administered discipline to the offending party, *etc.* Varner's timely complaint could have also resulted in the early rehabilitation of Edmiston, and perhaps even avoided him losing his job (since his offensive actions would likely have ceased after an early reprimand).

It was solely within Varner's power to keep the problem from intensifying. A simple grievance filed by Varner, early on in the course of her dealings with Edmiston, could also have avoided the need to have the E.E.O.C. incur the expense of investigating the case, the exorbitant cost of litigating this case before a jury in federal court, and considerable expense to the employer in having to defend itself during the course of the lawsuit. Nevertheless, in spite of Varner's numerous opportunities to inform her union or employer of her problems,

Varner chose to "save up" her complaints for a lawsuit in federal court. Surely this is not the type of prompt and efficient problem solving mechanism that Congress envisioned. The intent of the Title VII or the Labor Management Relations Act is not advanced by permitting such conduct, and actions such as Varner's serve to erode the very purpose of such grievance procedures; to resolve disputes before they get out of control.

As explained by the Supreme Court in *Republic Steel*, the union, as well as the employer has an interest in seeing union employee complaints processed through the grievance procedure. *Republic Steel*, 379 U.S. at 652. Involvement of the union will help insure uniformity in the management of sexual discrimination/harassment complaints, equality and impartiality in the treatment of complaining parties, consistency in dealing with harassers (who may also be union employees), and generally, will promote an orderly process for settling the employees' disputes. The need for such stability is emphasized by the fact that 16.4 million wage and salary employees were union members in 1995. In private industry, transportation, and public utilities, 27 percent of the workers are union members. In construction and manufacturing, 18 percent of the workers are union members. *See* "News", United States Department of Labor, Bureau of Labor Statistics, February 9, 1996, p. 1.

Title VII should be allowed to co-exist with, rather than displace, the federal policy encouraging mandatory arbitration of employment disputes under collective bargaining agreements. *Knox*, 899 F. Supp. at 1539. Allowing the current conflict between the federal jurisdictions to exist will cause uncertainty amongst the employees, unions and employers as to the enforceability of mandatory grievance provisions in collective bargaining agreements. *See Republic Steel*, 379 U.S. at 652.

**C. The *Alexander v. Gardner-Denver Co.*, Decision Is Not In Conflict With Petitioner's Request That This Court Find That A Union Employee Must Follow The Grievance And Arbitration Provision In Her Collective Bargaining Agreement Before Filing Suit Under Title VII; However, This Court May Wish To Examine The Eighth Circuit's Applicability Of Gardner-Denver To The Present Case**

The Eighth Circuit, *citing Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 49, 94 S. Ct. 1011, 1020 (1974), observed that the United States Supreme Court has held that "the pursuit of a claim through grievance and binding arbitration under a [Collective Bargaining Agreement] does not preclude a civil suit under Title VII." Relying exclusively upon the *Gardner-Denver* decision, the Eighth Circuit then stated: "and we believe the same reasoning applies to a plaintiff who has chosen not to participate in the grievance procedure." (App. 7a). In *Gardner-Denver*, the Court held that an aribtration decision in favor of the employer did not preclude the employee from filing suit later against the employer. In the present case, the facts are very different. Varner did not even file a grievance and, therefore, she never gave the employer or the union an opportunity to resolve, or if necessary, arbitrate her case. Hence, the question decided by *Gardner-Denver* is not at issue here.

Subsequent to *Gardner-Denver*, the Supreme Court decided *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 111 S. Ct. 1647, 114 L. Ed. 26 (1991). In *Gilmer*, the Supreme Court held that an employee's age discrimination claim can be subject to compulsory arbitration pursuant to an arbitration agreement. *Id.* at 1650. The Supreme Court concluded that the agreement required the arbitration of statutory claims in addition to contractual ones, and affirmed the appellate court's decision to compel arbitration of the plaintiff's ADEA action. *Id.* at 1657. The contract in *Gilmer* required that Gilmer arbitrate "any dispute, claim or controversy" arising between Gilmer and his employer "that is required to be arbitrated under the rules,

constitutions or by-laws of the organizations with which I register." *Gilmer*, 111 S. Ct. at 1650. This language is relatively vague when compared with the terms of the agreements in *Varner* and *Austin* which specifically refer to complaints of sex discrimination.

Because Varner has not yet filed a grievance under her Collective Bargaining Agreement, this case, like *Gilmer*, involves the issue of enforceability of an agreement to follow a grievance and arbitration process regarding complaints of discrimination (*i.e.* statutory claims), not, as in *Gardner-Denver*, the preclusive effect of a prior arbitration award. *See Gilmer*, 111 S. Ct. at 1647. Moreover, an agreement to arbitrate complaints of discrimination does not cause the party to lose his statutory rights, "it only submits their resolution in an arbitral, rather than a judicial forum." *Gilmer*, 111 S. Ct. at 1652, *citing Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628, 105 S. Ct. 3346, 3354, 87 L. Ed. 2d 444 (1985).

The *Gilmer* court held that a party should be held to a bargain to arbitrate a statutory claim "unless Congress itself has evinced an intention to preclude waiver of judicial remedies for the statutory rights at issue." *Gilmer*, 111 S. Ct. at 1657. Applying this holding to Title VII cases, there is no evidence that Congress intended to preclude substitution of an arbitral tribunal (or at least initial deferral to an arbitral tribunal) for a judicial forum in Title VII cases. As discussed above, § 118 of the Civil Rights Act of 1991 specifically *encourages* the use of arbitration as an alternative means of resolving employment discrimination disputes. 42 U.S.C. § 2000E, 105 Stat. 1071.

National is mindful of one distinction between the present case and *Gilmer*. The *Gilmer* court was not confronted with the enforcement of a grievance and arbitration clause in a collective bargaining agreement, rather *Gilmer*'s arbitration clause was contained in his securities registration application. The fact that this case involves a Collective Bargaining Agreement as did the

*Gardner-Denver* case, rather than a securities registration application as in *Gilmer*, is not relevant to whether Varner should be required to pursue her remedies through the Collective Bargaining Agreement before filing a Title VII suit for damages. *See Gilmer*, 500 U.S. at 35.

The *Gilmer* decision is not inconsistent with *Gardner-Denver* since *Gilmer* dealt with a private employee contract and *Gardner-Denver* dealt with a collective bargaining agreement. However, in deciding whether to accept Petitioner's application, this Court may wish to consider whether the holding in *Gardner-Denver* should be re-examined in light of the enactment of the Civil Rights Act of 1991 which encourages arbitration and in light of *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614, 105 S. Ct. 3346, 87 L. Ed. 2d 444 (1985). In *Mitsubishi*, the Supreme Court stated that "we are well past the time when judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals inhibited the development of arbitration as an alternative means of dispute resolution." 105 S. Ct. at 3354.

> By agreeing to arbitrate a statutory claim, a party does *not* forego the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than judicial, forum. It trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration. (Emphasis added).

*Mitsubishi*, 473 U.S. at 3354.

*Mitsubishi* involved claims of breach of contract, Sherman Act violations, interpretation of the Puerto Rico Dealers Act, *etc.*, and the Supreme Court had confidence that an arbitrator could adequately handle all of these issues. So long as the claimant may effectively vindicate his or her statutory cause of

action in the arbitral forum, the statute will continue to serve both its remedial and deterrent functions. *Mitsubishi*, 105 S. Ct. at 3359. Clearly the Supreme Court considers arbitrators competent to interpret and apply federal statutes, as evidenced by decisions such as *Gilmer* requiring arbitration of Title VII and ADA claims for individual employment contracts. *See also Willis v. Dean Witter Reynolds, Inc.*, 948 F.2d 305, 310 (6th Cir. 1991).

Although *Gilmer* and its progeny were cases involving the application of the Federal Arbitration Act, the presumption favoring arbitration is equally applicable to non-FAA cases. The Federal Arbitration Act is "a congressional declaration of a liberal federal policy favoring arbitration agreements." *Moses H. Cone Memorial Hospital v. Mercury Construction*, 460 U.S. 1, 24, 103 S. Ct. 927, 941, 74 L. Ed. 2d 765 (1983). Since both Congress and the Supreme Court have accepted arbitration as a reasonable and prudent method of resolving complex disputes, this Court should re-examine the enforceability of a grievance and arbitration clause pertaining to complaints of sexual discrimination in a union workplace.

**D. Summary Of Point I**

Varner's filing of a lawsuit without reporting her complaints to National's management or to the Union is an example of the type of acrimonious employer-employee situation that collective bargaining is designed to avoid. Section 201 of Title II of the Labor Management Relations Act provides that:

> (a) Sound and stable industrial peace and the advancement of the general welfare, health, and safety of the Nation and of the best interest of employers and employees can most satisfactorily be secured by the settlement of issues between employers and employees through the processes of

> conference and collective bargaining between employers and the representatives of their employees.

Labor Management Relations Act, Title II, § 201, 29 U.S.C. § 171(a) and (c), 61 Stat. 152 (1947).

The introductory language of the Collective Bargaining Agreement states the "intent" of the parties is to provide "a channel through which information and problems can be transmitted from one to another . . ." However, the intent of the parties cannot be carried out when the individual union employees refuse to transmit the "problems" through the agreed upon channels, nor when the Courts refuse to require employees to do so. The mandatory grievance and arbitration procedure bargained for in Varner's Agreement should be enforced as a condition precedent to filing suit against National for Title VII damages.

The conflict between the Circuits and lack of guidance from the Supreme Court will result in uncertainty amongst employers, employees and unions regarding the enforceability and applicability of grievance procedures to employee complaints of discrimination in a union workplace. Until this Court resolves the conflict, employers, employees, and unions will be unsure of whether employees are required to initially process complaints of discrimination in the workplace through the agreed upon channel of communication, the grievance process. Negotiated grievance procedures are critical, and some would say, the most important aspect of collective bargaining. The decision of the Eighth Circuit results in the beginning of the carving out of many exceptions to the mandatory grievance process.

Petitioner respectfully requests this Court to accept this case for hearing, and find that union employees are required to process their discrimination grievances through the negotiated process before filing suit against the employer.

## II.

**THERE IS A CONFLICT BETWEEN THE EIGHTH CIRCUIT IN THE PRESENT CASE AND THE THIRD CIRCUIT IN *BOUTIN v. BMW OF NORTH AMERICA* CONCERNING WHETHER AN EMPLOYER IS LIABLE FOR THE SEXUALLY HARASSING ACTS OF A NON-SUPERVISORY EMPLOYEE, WHEN THE EMPLOYER MAINTAINS AN EXPRESS POLICY PROHIBITING SEXUAL HARASSMENT AND EXPRESSLY PRESCRIBES PROCEDURES TO BE FOLLOWED FOR REPORTING COMPLAINTS OF SEXUAL HARASSMENT, AND THE VICTIM CHOOSES NOT TO FOLLOW THE REPORTING POLICY. IN *MERITOR v. VINSON*, THIS COURT HELD THAT AN EXPRESS POLICY WHICH ENCOURAGES VICTIMS TO COME FORWARD AND REPORT THEIR COMPLAINTS OF HARASSMENT MIGHT INSULATE AN EMPLOYER FROM LIABILITY, AND THIS CASE PRESENTS THE COURT WITH THE OPPORTUNITY TO EXPOUND UPON THIS POTENTIAL DEFENSE FOR EMPLOYERS.**

### A. The Supreme Court Should Clarify Under What Circumstances An Employee Is Required To Follow An Employer's Express Policy For Reporting Complaints Of Sexual Harassment And Whether An Employee's Failure To Follow The Express Policy Insulates The Employer From Liability

In *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 61, 106 S. Ct. 2399, 2408 (1986), this Court held that Congress evinced an "intent to place some limits on the acts of employees for which employers under Title VII are to be held responsible." *Meritor*, 477 U.S. at 71. In *Meritor*, the employer had a general non-discrimination policy, rather than a specific policy directed against sexual harassment, and the employer required that the victim must first complain to her supervisor, who in *Meritor*, happened to be the perpetrator of the harassment.

The employer in *Meritor* argued that the existence of the employer's grievance procedure and policy against discrimination, coupled with the employee's failure to invoke that procedure, must insulate the employer from liability. The Supreme Court rejected the employer's argument because: (1) the employer's policy was a "general nondiscrimination" policy that did not specifically address sexual harassment, and "thus did not alert employees to employer's interest in correcting that form of discrimination"; and (2) the employer's "grievance procedure" required the employee to report the harassment to the perpetrator of the harassment, her supervisor. However, this Court concluded its discussion by stating:

> [The employer's] contention that [the employee's] failure [to follow the grievance procedures] should insulate it from liability might be substantially stronger if its procedures were better calculated to encourage victims of harassment to come forward.

*Meritor*, 477 U.S. at 71.

The Court's statement strongly suggests that an employer may be insulated from liability if the employer has a written policy against sexual harassment which contains procedures calculated to encourage victims of harassment to come forward, and the victim fails to follow the prescribed procedures. The current case presents this Court with the opportunity to consider the question of whether an employer can be liable for the harassing acts of a non-supervisory employee when the employer has an express policy for the reporting of the harassment and the victim chooses not to come forward to file her complaint with the employer before filing her complaint with the Equal Employment Opportunity Commission.

A plaintiff must establish five elements to hold an employer liable under a under a hostile work environment sexual harassment claim: (1) the victim is a member of a protected group; (2) she was subjected to unwelcome sexual harassment; (3) the harassment was based on sex; (4) the harassment affected a term, condition, or privilege of employment; and (5) the employer knew or should have known of the harassment and failed to take appropriate remedial action. *Stanton v. Maries County*, 868 F.2d 996, 998 (8th Cir. 1989). However, there is a serious problem in the application of this law when an employer can be held liable for harassment by a non-supervisory employee regardless of whether the individual claiming harassment knowingly chooses to ignore the employer's reporting procedures.

In the present case, National had a written policy against sexual discrimination which also sets out the procedure for reporting a complaint of sexual harassment. National's Policy requires that all complaints of sexual harassment be reported to either Carol Schoene or Roger Beckman, and that thereafter a confidential investigation of the complaint will be undertaken. The Policy informs the employees that upon completion of the investigation, the harasser will be subject to discipline, up to and including discharge. (App. 64a-65a, 67a-68a).

Varner knew of National's Policy and the reporting procedure at the inception of her employment (App. 58a-63a). Varner testified that she was instructed to report the harassment but that she "chose" not to report it to anyone at National.

Varner claims that she was subjected to four offensive comments and one offensive physical contact by Edmiston before the last offensive incident. These events occurred over a period of at least several months. During those months, Varner had ample opportunity to follow National's policy and report her complaints. Holding National liable when its employee decided that she simply was not going to follow National's

reporting procedures results in National being held strictly liable for the acts of its non-supervisory personnel. Under the Eighth Circuit's ruling, any employee can simply ignore the rules for the reporting of sexual harassment, "save up" all of her complaints, never give her employer an opportunity to investigate or remedy the problem, and then file a lawsuit against the employer for damages.

In the present case, it was solely within Varner's power to keep the harassment from continuing. A simple verbal complaint made by Varner, early on in the course of her interaction with Edmiston, would have avoided the need to have the EEOC/MCHR investigate Varner's claims, would have avoided the exorbitant expense of Varner's awarded attorneys' fees and costs, would have avoided the Court's time and expense in overseeing the discovery, trial proceedings, and appeals, and would have avoided any damages Varner claimed at trial.

Prior to the last incident of harassment, the incident upon which the majority of Varner's damages were claimed at trial, Varner "chose" to tell her school counselor, her boyfriend and her mother of Edmiston's actions. However, Varner elected not to inform National of her complaints.

National's Director of Human Resources and Labor Relations testified as to the extensive research and thought that went into the preparation of National's Policy against sexual harassment, including the development of the reporting procedures. The Director testified that when developing National's Policy against sexual harassment, National reviewed the existing law, national and local labor law publications, consulted with other similarly situated corporations, reviewed publications directed towards the supermarket industry, and consulted with attorneys. In this research, National observed that the majority of the published cases of sexual harassment, nationwide and in the supermarket industry, involved harassment by a supervisor. As a result, National's Policy requires that the

victim report to individuals outside the store environment, Roger Beckman and Carol Schoene. This reporting procedure ensures that the victim is not required to report the harassment to a harassing supervisor, respects the victim's confidentiality concerns, and ensures an impartial and unbiased investigation. National did not want a Policy that contained a lot of contingencies, and it purposely drafted the policy so it was easy to understand and follow.

In the present case, National took the initiative to implement a policy prohibiting any form of sexual harassment and it set forth a written procedure for filing complaints of harassment. The Policy requires that the employee voice his/her complaints to specific individuals who are trained to conduct confidential investigations. The Policy removes the need for the employees to complain to his/her supervisor and ensures an impartial investigation. The Policy ensures, that in a large organization, such as National, only those individuals with training and experience are allowed to conduct such sensitive investigations, and by requiring that the victim complain to certain individuals, the company is assured that the proper people of authority have knowledge of all instances of harassment.

Varner admits that she did not follow the known Policy and that she knew that she was the one who needed to come forward and report the situation, but claims that since her boyfriend spoke to the manager of the store, she did not need to do anything further. This is exactly the type of situation that National's Policy was designed to avoid. A complaint by a harassee's boyfriend to someone who was not charged with or experienced in otherwise handling sexual harassment complaints resulted in the employer being held liable for the harassment when the proper individuals of authority had no knowledge of the harassment.

The Court should accept this opportunity to clarify when an employer can be liable for acts of sexual harassment when

the harassee chooses not to report the harassment through the proper channels.

**B. The Conflict Between The Third And Eighth Circuits**

There is a conflict between the Third and Eighth Circuits regarding employer liability when the employee fails to report the harassment. The Third Circuit in *Bouton v. BMW of North America, Inc.*, affirming the District Court's judgment against employee Bouton, held that a grievance procedure that is known to the victim and that timely stops the harassment shields the employer from Title VII liability for a hostile environment. *Bouton*, 29 F.3d 103, 110 (1994). In *Bouton*, the company's oral policy regarding sexual harassment was that "there will be none." Any complaints of sexual harassment could be pursued through the company's general grievance procedures. *Bouton*, 29 F.3d at 109. *Bouton* interpreted *Meritor* as allowing for the "possibility that an employer could escape liability if the [grievance] procedure was sufficiently effective." *Id.* at 107.

Even though National had a more specific, written Policy against sexual harassment than in *Bouton*, and even though Varner chose not to report the harassment to anyone at National in spite of her knowledge of the Policy, including the grievance procedure, the Eighth Circuit held National liable under Title VII for a hostile working environment. The Eighth Circuit held that Varner's failure to invoke the reporting procedures of National's Policy does not entitle National to judgment as a matter of law. (App. 8a).

Although the Eighth Circuit in this case recognized that National had a written policy against sexual harassment and a grievance procedure for reporting such complaints, the Court held, contrary to *Bouton*, that "National's sexual harassment policy is not alone sufficient to shield it from liability." (App. 8a).

The Eighth Circuit misapplied the dicta in *Meritor*. The Eighth Circuit stated that: "[t]he Meritor Court found that a policy that was not 'calculated to encourage victims of harassment to come forward' did not insulate the company from liability." (App. 9a). The Eighth Circuit stated that National's Policy was insufficient because the employee's immediate supervisor was not required to report the harassment to the appropriate individuals when the complaint was lodged by a third party, non-witness, Varner's boyfriend. (App. 8a-9a). National's Policy did encourage employees to come forward and it specified to whom the complaints should be made. National's Policy should not be deemed insufficient because Varner chose to have her boyfriend report her complaints to someone who was not responsible for investigating such complaints.

**C. Various Circuits Have Interpreted *Meritor* Differently And This Court Should Clarify The Holding In *Meritor***

In *Gary v. Long*, 39 F.3d 1391, 1397-1398 (D.C. Cir. 1995), the United States Court of Appeals held, *citing Meritor*, that the employer is not liable for sexually hostile work environment if the employee knew or should have known that: (1) the employer did not tolerate sexual harassment; and (2) the employee could report it to the employer without fear of adverse consequences. *Gary*, 39 F.3d at 1398.

In *Jansen v. Packaging Corp. of America*, 895 F. Supp. 1053, 1067 (N.D. Ill. 1995), the employer was granted summary judgment under a hostile work environment claim because the employee knew or should have known that the perpetrator's conduct was not sanctioned by the company. The District Court for the Northern District of Illinois held that the employee "plainly" knew she had "some recourse at [the company]." *See also Weaver v. Minnesota Valley Laboratories, Inc.*, 470 N.W. 2d 131, 135 (Minn. App. 1991) (holding an employer not liable because the employee failed to complain).

In *Equal Employment Opportunity Commission v. Hacienda*, 881 F.2d 1504, 1516 (9th Cir. 1989), the employer, like *Meritor*, had a general non-discrimination policy that did not specifically prohibit sexual harassment and required initial resort to the supervisor who is accused of engaging in the harassment. Although the District Court cited *Meritor* when it denied the employer's argument that the employer was insulated from liability because of the employee's failure to pursue her internal remedies, the District Court further stated: "[i]n any event, this court has held that a Title VII plaintiff need not exhaust her employer's internal remedies." *Hacienda*, 881 F.2d at 1516, *citing Miller v. Bank of America*, 600 F.2d 211 (9th Cir. 1979). *Miller* is a pre-*Meritor* case and, therefore, does not consider the dicta of *Meritor*.

**D. Summary Of Point II**

Varner knew or should have known of National's policy against sexual harassment. Varner knew, by her own admission, that she should have reported her complaints about Edmiston. Varner simply chose not to. Varner's failure to properly report her complaints should bar her recovery under Title VII.

In *Meritor*, this Court implied that a proper policy which specifically condemns sexual harassment, encourages employees to report acts of harassment, and provides for a reporting procedure to someone other than the harasser, might shield an employer from liability for the harassing acts of its employees. In the present case, not only did the employer have such a policy, but the employee totally failed to follow the procedures set out in the policy, and instead, filed her complaint directly with the E.E.O.C.

National respectfully requests this Court to accept this Petition for Writ of Certiorari and specify when, if ever, such a policy must be followed by an employee before the employee is allowed to recover damages against its employer.

## CONCLUSION

For the stated reasons, National Super Markets, Inc.'s Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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**APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT FILED SEPTEMBER 9, 1996**

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 95-3611

Lisa Anne Varner, Rony Varner, Peggy Varner,

Plantiffs/Appellees,

v.

National Super Markets, Inc.,

Defendant/Appellant.

No. 95-3839

Lisa Anne Varner,

Plaintiff/Appellant,

Rony Varner, Peggy Varner,

Plaintiffs,

v.

National Super Markets, Inc.,

Defendant/Appellee.

*Appendix A*

Appeals from the United States District Court for the Eastern District of Missouri.

Submitted; June 10, 1996

Filed: September 9, 1996

Before WOLLMAN, Circuit Judge, HENLEY, Senior Circuit Judge, and DOTY,* District Judge.

WOLLMAN, Circuit Judge.

National Super Markets, Inc. (National) appeals the district court's[1] judgment in favor of Lisa Anne Varner on her claim brought under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e et seq., and the Missouri Human Rights Act (MHRA), Mo. Rev. Stat. §§ 213.010 et seq. Varner cross-appeals various rulings by the district court. We affirm.

I.

Over the course of several weeks in the spring of 1991, Robert Edmiston, a 51-year-old produce worker at National, approached Varner, a 17-year-old floral worker, and made graphic sexual comments and displayed pornography to her. In July or August of 1991, Edmiston approached Varner from behind, reached his arms under Varner's arms, and squeezed her

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* The HONORABLE DAVID S. DOTY, United States District Judge for the District of Minnesota, sitting by designation.

1. The Honorable Jean C. Hamilton, Chief Judge, United States District Court for the Eastern District of Missouri.

breasts. Varner broke free and ran from the room. She then finished her shift and went home. Varner called Chris Pilch, who was her fiance and also a National employee, and related what had happened. Pilch immediately called Curtis Mason, the store manager, and told him that Edmiston had grabbed Varner's breasts. According to Pilch's testimony, Mason told him that he could not do anything unless Varner reported the incident to him, and then he could possibly say something to Edmiston, but that would make the situation worse. According to Pilch, Mason further advised him that "he could just let it alone and maybe Bob would just leave her alone and forget about it." Mason did not report the incident to anyone.

On November 22, 1991, Edmiston again approached Varner from behind, put his arms through her arms, and grabbed her breasts. Edmiston then grabbed Varner's thumbs and forced her hand behind her back into his crotch area. Varner again broke free and ran from the room — on her way out telling co-worker Patrick McCorkle that Edmiston had grabbed her. Varner finished her shift and went home, where she told her mother what had happened and then called Pilch and told him what had happened. Pilch called Mason that evening and told him that Edmiston had again grabbed Varner's breasts. Pilch testified that Mason's response was the same this time as it had been after the first complaint, except this time Mason added an additional dismissive comment: "That's just Bob being himself." Mason again took no further action. Mason testified that he told Pilch to tell Varner to call Roger Beckman in the Human Resources Department.

Varner reported the incident to the police the next morning. At the police officers' request, Varner telephoned Edmiston. The police taped the conversation, in which Edmiston admitted

sexually assaulting Varner on two occasions. The police went to National's store and arrested Edmiston. Mason told the police that he was aware of the incidents but that there was nothing he could do unless Varner told him about it herself. Mason then contacted his district manager about the incident.

Although Varner continued to work, she suffered from nightmares, mood swings, depression and crying episodes, and she became afraid to go to work. She was diagnosed as suffering from post-traumatic stress syndrome caused in part by the sexual comments and the first touching incident, but mostly caused by the November 22, 1991 incident.

National's sexual harassment policy directs employees who believe they have been subjected to sexual harassment to contact individuals in the Human Resources Department or the Labor Relations Department. The policy provides that a supervisor who has learned of an incident of sexual harassment is to direct the employee to contact one of those individuals; the supervisor is not to take any personal action. The policy was included in the employee orientation handbook that Varner had agreed to familiarize herself with during orientation.

Varner was a member of United Food & Commercial Workers' Union, Local 655, which has a collective bargaining agreement (CBA) with National. Varner did not participate in the grievance and arbitration procedures in place under the CBA.

Varner filed a complaint with the Missouri Commission on Human Rights (MCHR) and the Equal Employment Opportunity Commission (EEOC) on May 18, 1992. She then filed her complaint in Missouri state court. National removed

the action to federal district court. A jury awarded Varner $30,000 in actual damages. The district court denied National's motion for judgment as a matter of law (JAML).

National argues on appeal that the district court erroneously denied its motion for JAML because: (1) Varner's exclusive remedy is under the Missouri workers' compensation law; (2) Varner failed to exhaust grievance and arbitration remedies under the CBA; (3) Varner failed to invoke the reporting procedures of National's sexual harassment policy; and (4) Varner failed to timely file her administrative complaint, and thus her claims concerning any pre-November 22, 1991 incidents were barred by the statute of limitations. Varner cross-appeals, arguing that the district court erred in formulating jury instructions, admitting and excluding certain evidence, and in failing to submit her punitive damages claim to the jury.

We review a district court's denial of a motion for JAML de novo, applying the same standard used by that court. *Triton Corp. v. Hardrives, Inc.*, 85 F.3d 343, 345 (8th Cir. 1996). We must view all facts and resolve any conflicts in favor of Varner, giving her the benefit of all reasonable inferences. *Id.* We will affirm the denial of the motion for JAML if a reasonable jury could differ as to the conclusions that could be drawn, and we will not weigh, evaluate, or consider the credibility of the evidence. *Id.*

## II.

National first argues that the district court lacked subject matter jurisdiction over Varner's complaint because Varner's exclusive remedy was under state workers' compensation law,

as the damages she claimed were the same as those provided under the Workers' Compensation statute. Mo. Rev. Stat. §§ 287.010 et seq. The exclusivity provision of the Missouri workers' compensation statute provides that:

> The rights and remedies herein granted to an employee shall exclude all other rights and remedies of the employee . . . at common law or otherwise, on account of such accidental injury as death, except such rights and remedies as are not provided for by this chapter. Mo. Rev. Stat. § 287.120.2.

We recently rejected a similar contention, holding instead that the exclusivity provision cannot preempt an employee's federally-created right to recover damages under Title VII. *Karcher v. Emerson Electric Co.*, No. 95-3427, slip op. at 12 (8th Cir. Sept. 4, 1996). Moreover, as we did in *Karcher*, we decline to read the provision to bar the recovery of damages under the MHRA absent clear direction from the Missouri courts, and we have found no such direction.

Although Missouri courts have held that the exclusivity provision bars common law tort actions that arise out of incidents covered by the workers' compensation act statute, *see, e.g., Hill v. John Chezik Imports*, 797 S.W.2d 528, 531 (Mo. Ct. App. 1990), they have not extended the exclusivity provision to bar suits under the MHRA. Indeed, the language of the MHRA appears to preclude any such finding. The statute states, in relevant part, that:

> The provisions of this chapter shall be construed to accomplish the purposes

thereof and any law inconsistent with any provision of this chapter shall not apply.

As we said in *Karcher,* we interpret broadly the remedial purpose of the MHRA, and we thus hold that an award of damages under the statute is not foreclosed by the possibility that such damages would have been recoverable under the Workers' Compensation Act. *Karcher*, slip op. at 12.

## III.

National next argues that the district court erred in failing to grant its motion for JAML because Varner failed to exhaust grievance and arbitration remedies under the CBA.

The Missouri Supreme Court has resolved this question with respect to the MHRA, holding that exhaustion of other available administrative remedies is not required before filing suit underthe MHRA. *Green v. City of St. Louis,*, 870 S.W.2d 794, 796 (Mo. 1994) (en banc). Moreover, the United States Supreme Court has held that the pursuit of a claim through grievance and binding arbitration under a CBA does not preclude a civil suit under Title VII, *see Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 49 (1974), and we believe the same reasoning applies to a plaintiff who has chosen not to participate in the grievance procedure.

In *Alexander,* the Court stated that, "federal courts have been assigned plenary powers to secure compliance with Title VII." 415 U.S. at 47. We interpret this absolute grant of power to entail an absolute right to adjudicate suits under Title VII as long as the jurisdictional prerequisites dictated in Title VII itself are satisfied. These prerequisites do not include an

exhaustion of grievance procedures under a CBA. *See* 42 U.S.C. § 2000e-5(b), (e) and (f). *See also Stacks v. Southwestern Bell Yellow Pages, Inc.*, 27 F.3d 1316, 1326 n.3 (8th Cir. 1994). Thus, National's argument that such an exhaustion is required before bringing suit is without merit, and the district court therefore did not err in denying National's motion for JAML.

## IV.

National next argues that the district court erred in denying its motion for JAML because Varner failed to invoke the reporting procedures of National's sexual harassment policy. We reject this claim. The relevant question is whether National knew or should have known of the harassment and failed to implement prompt and appropriate corrective action. *Staton v. Maries County*, 868 F.2d 996, 998 (8th Cir. 1989).

We conclude that Varner's reports of the incidents to Mason through Pilch sufficiently put National on notice of the incidents. We look to agency principles to determine whether an employer knew or should have known of the harassment. *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 72 (1986). Indeed, Title VII defines employer to include any "agent" of the employer. 42 U.S.C. § 2000e(b). Accordingly, Pilch's notification to Mason while Mason was acting in his supervisory capacity was sufficient to constitute notice to National. We find no significance in the fact that it was Varner's fiance who notified Mason, rather than Varner herself.

Moreover, we conclude that once National was notified, it failed to take reasonable remedial action. Sufficient evidence supports a finding that Mason's response to Pilch's complaint

was inadequate. Moreover, even if Mason was not the proper person to conduct an investigation of the incidents and take the appropriate corrective action, he had undisputed supervisory authority and could have informed the appropriate individuals responsible for taking action.

Further, we conclude that National's sexual harassment policy is not alone sufficient to shield it from liability. The Supreme Court in *Meritor* held that while a plaintiff's failure to invoke a company's written procedure is relevant, it is not dispositive. 477 U.S. at 72. The Court found that a policy that was not "calculated to encourage victims of harassment to come forward" did not insulate the company from liability. *Id.* at 73. National's policy, although certainly laudable in its intentions and objectives, in effect required Varner's supervisor to remain silent notwithstanding his knowledge of the incidents. We can understand an employer's desire to utilize a chain-of-command structure, but a procedure that does not require a supervisor who has knowledge of an incident of sexual harassment to report that information to those who are in a position to take appropriate action falls short of that which might absolve an employer of liability.

## V.

National argues that Varner failed to timely file her administrative complaint with respect to all except the November 22, 1991, incidents of sexual harassment. A plaintiff is required to file a complaint under Title VII and the MHRA with the relevant enforcement agency within three hundred days of the discriminatory act. *See* 42 U. S. C. § 2000e-5 (e); Mo. Rev. Stat. §§ 213. 075, 213.111. Varner filed a concurrent complaint with the MCHR and the EEOC on May 18, 1992. The

November 22, 1991, incident clearly falls within the limitations period. The earlier incidents of verbal harassment, however, do not. Because the witnesses could only approximate the date of the first touching incident, it is unclear whether that incident fell within the relevant period.

Even if we assume that the November 22 assault is the only incident that fell within the statute of limitations, National's argument still must fail. We have found that evidence of a hostile environment falls under the "continuing violation" exception to a statute of limitations bar and that the limitations period runs from the "last occurrence of discrimination." *Gipson v. KAS Snacktime Co.*, 83 F.3d 225, 229 (8th Cir. 1996) (citations omitted). Under this theory, the entire course of conduct creating the hostile environment suffered by Varner is actionable.

## VI.

Varner cross-appeals the district court's decision not to submit a punitive damages instruction to the jury. To collect punitive damages under the Civil Rights Act of 1991, Varner must show that National engaged in discrimination "with malice or reckless indifference to [her] federally protected rights." 42 U.S.C. § 1981a(b)(1). To collect punitive damages under the MHRA, Varner must show that National's conduct was "outrageous because of its evil motive or reckless indifference to [Varner's rights]." *Kientzy v. McDonnell Douglas Corp.*, 990 F.2d 1051, 1062 (8th Cir. 1993).

Varner made no showing that National acted with malice or deliberate indifference or that its conduct was outrageous. *See Nelson v. Boatmen's Bancshares, Inc.*, 26 F.3d 796, 804 (8th Cir.

1994) (to recover punitive damages, Missouri law requires showing of conduct that would "shock the conscience and cause outrage"); *Turic v. Holland Hospitality, Inc.*, 85 F.3d 1211, 1216 (6th Cir. 1996) (duplicitous actions of employees insufficient to support punitive damages award under Civil Rights Act of 1991); *Pandazides v. Virginia Bd. of Educ.*, 13 F.3d 823, 830 n.9 (4th Cir. 1994) (a showing of more than intentional discrimination is required to recover punitive damages under Civil Rights Act of 1991). Accordingly, the trial court did not err in refusing to submit a punitive damages instruction to the jury.

Given our holding on National's claims on appeal, we need not address Varner's remaining claims on cross-appeal.

The judgment is affirmed.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

## APPENDIX B — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MISSOURI, EASTERN DIVISION FILED AUGUST 23, 1996

**UNITED STATES DISTRICT COURT**
**EASTERN DISTRICT OF MISSOURI**
**EASTERN DIVISION**

Cause No. 4:93CV663 JCH

LISA ANNE VARNER, et al.,

Plaintiffs,

v.

NATIONAL SUPERMARKETS, INC.,

Defendant.

**MEMORANDUM AND ORDER**

This matter is before the Court on Plaintiff's Motion for Judgment as a Matter of Law Pursuant to Federal Rule of Civil Procedure 50(b), Plaintiff's Motion for an Award of Attorneys' Fees and Expenses, and Defendant's Response to Plaintiff's Request for Costs.

**I. Motion for Judgment as a Matter of Law**

On June 23, 1995, this Court entered judgment on the verdict awarded by the jury. Defendant now moves for judgment as a matter of law on the following grounds: (1) the Court lacked subject matter jurisdiction over Plaintiff's claims;

(2) Plaintiff failed to exhaust her administrative remedies; (3) Plaintiff failed to comply with the procedure of a written harassment policy; and (4) Plaintiff failed to timely file her Complaint with the Missouri Commission on Human Rights and the Equal Employment Opportunity Commission. Plaintiff opposes Defendant's motion for judgment as a matter of law.

After consideration of this matter, the Court will deny Defendant's motion. Defendant raised the above issues during trial and the Court declines to revisit such issues.

**II. Motion for Attorneys' Fees and Expenses**

Pursuant to 42 U.S.C. § 2000e-5(k), Plaintiff seeks an award of attorneys' fees in the amount of $130,639.50. Defendant opposes this motion.

Plaintiff brought this cause of action alleging Negligent Hiring and Retention, violation of the Missouri Human Rights Act, violation of the Federal Civil Rights Act, and Negligent Hiring and Retention. In an Order entered April 14, 1994, the Court dismissed Counts I and IV of Plaintiff's Complaint. Thereafter, on June 23, 1995, the trial court entered judgment on the jury's verdict awarding Plaintiff $30,000.00 in damages on Counts II and III of her Complaint.

Pursuant to 42 U.S.C. § 2000e-5(k):

> [i]n any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party . . . reasonable attorney's fees (including expert fees) as part of the costs.

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The Missouri Human Rights Act contains a similar provision. Rev.Mo.Stat. § 213.111.2. In determining an award of attorney's fees, the starting point is the calculation of the lodestar. The lodestar is derived by multiplying the number of hours reasonably expended times a reasonable hourly rate. *Blanchard v. Bergeron*, 489 U.S. 87 (1989) (citing *Blum v. Stenson*, 465 U.S. 886 (1984)). Once the court determines the lodestar amount, the court considers the twelve *Johnson* factors to determine the reasonableness of the fee. These factors are:

(1) the time and labor required;

(2) the novelty and difficulty of the questions;

(3) the skill requisite to perform the legal service properly;

(4) the preclusion of other employment by the attorney due to acceptance of the case;

(5) the customary fee;

(6) whether the fee is fixed or contingent;

(7) time limitations imposed by the client or the circumstances;

(8) the amount involved and the results obtained;

(9) the experience, reputation, and ability of the attorneys;

(10) the 'undesirability' of the case;

(11) the nature and length of the professional relationship with the client; and

(12) awards in similar cases.

*Blanchard*, 489 U.S. at 91 n.5 (citing *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974)).

The law firm of Riezman & Blitz requests $130,639.50 in attorney's fees. Robert Blitz, lead counsel and partner, worked a total of 310.7 hours, and partner Robert O'Neal worked 22.7 hours on the case. Attorney Ellen Dunne worked 535.5 hours, attorney Nelson L. Mitten worked 13 hours, attorney Suzanne M. Besnia worked .5 hours, attorney Sherry L. Gunn worked 74.4 hours, attorney E.W. Gentry Sayad worked 44 hours, attorney Matthew D. O'Leary worked 1.7 hours, and attorney Thomas Avery 16.4 hours. Paralegals Suzanne Jordan, Shannon Kister, Kristine Wall, Christine Rallo, Merrily D. Pease, Laura S. Swindle, and Sue L. Gerard worked a total of 55.1 hours. (Pltf's Exh. B). Plaintiff requests $200.00 per hour for Mr. Blitz, $165.00 per hour for Mr. O'Neal, $90.00 per hour for Ms. Dunne, $150.00 per hour for Mr. Mitten, $125.00 per hour for Ms. Besnia, $90.00 per hour for Ms. Gunn, $85.00 per hour for Mr. Sayad, $75.00 per hour for Mr. O'Leary, and $65.00 per hour for Mr. Avery. Plaintiff also requests $55.00 per hour for work performed by paralegals.

Defendant asserts numerous objections to Plaintiff's fee request for the Riezman & Blitz law firm. First, Defendant argues that the rates charged by Mr. Blitz are excessive.

*Appendix B*

Defendant cites numerous cases from this District in which lead counsel received no more than $150.00 per hour. *See Brown v. The Washington University,* Cause No. 88-1907-C-5; *Rosenfeld v. El Torito Restaurants, Inc.,* Cause No. 88-1959-C-2; *Doyne v. Union Electric,* Cause No. 89-2120-C-1; *Kientzy v. McDonnell Douglas Corp.,* Cause No. 90-584-C-1; *Bagsby v. St. Louis Bd. of Police Commr's,* 783 F.Supp. 1214 (E.D. Mo. 1992). This Court has awarded $185.00 per hour for lead counsel, however, based in part on lead counsel's exemplary performance at trial. *Sinskey v. McDonnell Douglas Corp.,* Cause No, 4:92CV1122 (JCH); *See Serben v. Inter-City Mfg. Co., Inc.,* Cause No., 4:92CV1545 DJS (CDP) (awarding lead counsel $180.00 per hour in January, 1994). After review of Eastern District cases, the Court finds that $200.00 is not a reasonable hourly rate for lead counsel in this matter. Therefore, the Court will reduce the Mr. Blitz's hourly rate to $150.00 per hour. The Court will also reduce the hourly rate of Mr. O'Neal to $150.00 per hour. This figure is consistent with an amount recently requested by lead counsel from Riezman & Blitz in *Sinskey v. McDonnell Douglas Corp.,* Cause No. 4:92CV1122 (JCH). The Court will not reduce the hourly rates of the other attorneys involved in this matter as the Court finds such rates reasonable.

Second, Defendant objects to the number of hours Mr. Blitz and Ms. Dunne expended in litigating this case. Plaintiff requests attorneys' fees for a total of 1,074.30 hours, 846.2 hours are attributable to Mr. Blitz and Ms. Dunne. Plaintiff argues that this number of hours is excessive and not justified. In support of the number of hours expended, Plaintiff's counsel argues that this matter involved "unique facts and issues of proof" that "required diligent investigation and development by Ms. Varner's counsel." (Plft's Memo, p. 6) The Court finds

that 846.2 hours constitutes an excessive amount of time for lead and co-counsel to expend on this matter given that trial lasted only five days, including closing argument and jury deliberation. The facts and legal issues involved in this case were no so complex as to warrant over eight hundred hours work. Review of similar cases in this District; reveals that 846.2 hours is an unreasonable amount of time for Plaintiff's lead counsel and co-counsel to have expended on this matter. In *Sinskey v. McDonnell Douglas,* Plaintiff's lead counsel expended approximately 233 compensable hours preparing for and arguing the case at trial. In *Kestern v. Dental Arts Laboratory Inc.*, Cause No. 4:92CV95 (GFG), lead counsel's hours totaled 194.6. In *McMahon v. Crystal Heating and Cooling Service, Inc.*, Cause No. 90-76-C-4, lead counsel Mary Ann Sedey expended 75.5 hours. The total number of hours submitted in that case, a title VII case that was tried to a jury, was 161.2. The instant case did not warrant the expenditure of nearly 900 hours of work by lead counsel and co-counsel. Accordingly, the Court will reduce the hours expended to a reasonable amount. The Court will reduce Mr. Blitz's total hours from 310.70 to 200 hours. Similarly, the Court will reduce Ms. Dunne's total hours from 535.50 to 300 hours. The Court finds that a total of 500 hours for lead and co-counsel is more than reasonable in this matter.

Third, Defendant argues that the attorneys' fees should be reduced based on the existence of a contingency fee agreement between Plaintiff and Riezman & Blitz. In *Blanchard,* 489 U.S. at 92-94, the Supreme Court noted that the fee arrangement is one factor for the court to consider in assessing attorney's fees. It is not, however, dispositive. The Court explained that " '[t]he fee quoted to the client or the percentage of the recovery agreed to is helpful in demonstrating attorney's fee expectations when he accepted the case.' " *Id.* at 93 (quoting *Pennsylvania v.*

*Delaware Valley Citizens' Council for Clean Air,* 483 U.S. 711, 723 (1987)). However, a contingent fee agreement does not limit the amount of fees an attorney may be awarded. 489 U.S. at 93.

In this case, Plaintiff entered into an agreement with Riezman & Blitz whereby Plaintiff's attorneys would recover 33 and 1/3% of any pre-lawsuit settlement and 40% of the total amount collected after the filing of the lawsuit. (Pltf's Exh. A) Defendant argues that the contingency fee agreement is significant because up to and including the final date of presentation of evidence, Plaintiff's demand was $75,000.00. Accordingly, Plaintiff's counsel were amenable to receiving 40% of $75,000 as payment in this matter. Defendant argues that in view of the contingency agreement, Plaintiff's attorneys' fees should be reduced. The Court agrees that the contingency fee agreement is relevant to its determination of attorneys' fees and will consider this factor in calculating Plaintiff's fee award.

Fourth, Plaintiff argues that the attorneys' fees should be reduced based on Plaintiff's limited success at trial. "[W]here the plaintiff achieved only limited success, the district court should award only that amount of fees that is reasonable in relation to the results obtained." *Hensley v. Eckerhart,* 461 U.S. 424, 440 (1983). The Court agrees that Plaintiff may not recover attorney's fees for hours spent on briefing the issues raised in Courts I and IV or her complaint as Plaintiff did not prevail on these distinct issues. Rather, the Court dismissed Counts I and IV in ruling on Defendant's Motion to Dismiss the entire Complaint. Ms. Dunne billed 11.20 hours preparing her memorandum in opposition to Defendant's motion to dismiss. (Pltf's Exh. B, p. 6) In absence of more specific evidence regarding the amount of time devoted to the memorandum, the Court assumes that Plaintiff's counsel expended 5.1 hours on

addressing Counts I and IV. Accordingly, the Court will exclude 5.1 hours at a rate of $90.00 per hour, Ms. Dunne's hourly rate. Moreover, Plaintiff may not recover for hours spent researching Defendant's motion for a new trial which was never submitted to this Court. Accordingly, the Court will exclude 10.1 hours for researching the motion for new trial. (Pltf's Exh. B, p. 39-40). The Court will deduct 3.6 hours at a rate of $150.00 per hour, and 6.5 hours at a rate of $90.00 per hour. *Id.*

Fifth, Defendant objects to the total number of hours submitted on grounds that Plaintiff's counsel has submitted redundant, duplicative, or unnecessary hours. Defendant claims that Plaintiff should not be awarded attorneys' fees for time spent "filing, retrieving documents, and reading background cases." (Deft's Memo, p. 12) Specifically, Defendant claims that the 52.5 hours spent researching the elements of a civil rights act claim should be excluded from the award of attorneys' fees. The Court finds that time spent researching the relevant area of law is not unnecessary. *See Leftwich v. Harris-Stowe State College,* 702 F.2d 686, 95 (8th Cir. 1983) Thus, the Court will overrule Defendant's objection on this basis.

Defendant also objects to 17.7 hours billed as preparation time for taking the deposition of Plaintiff and her parents. Defendant claims that only two hours were actually spent with deponents. Defendant further objects on grounds that two attorneys attended the depositions. The Court does not find 17.7 hours to be an unreasonable amount of time to spend preparing for and deposing the Plaintiff and her parents. Accordingly, the Court will overrule Defendant's objection.

Defendant further objects to 1.5 hours billed for a meeting

between Mr. Blitz and Mr. Varner on grounds that the purpose of the meeting is not stated. (Pltf's Exh. B, p. 2) The Court will deduct 1.5 hours at a rate of $150.00 per hour from the award of attorneys fees because the records regarding this billing entry are not sufficient to apprise the Court of the purpose of the meeting.

Additionally, Defendant objects to 7.1 hours charged for research and drafting of a memorandum in opposition to a motion to compel on grounds that this entry is dated June 28, 1995, five days after the jury returned its verdict in this matter. (Plft's Exh. B, p. 40) The Court will deduct 7.1 hours at a rate of $90.00 per hour from the award of attorneys' fees.

Defendant also objects to 1.7 hours billed for a request to Dr. Wolfgram to provide copies of medical bills and records. (Plft's Exh. B, p. 7) Review of the records submitted in support of Plaintiff's motion however, indicate that Mr. O'Neal performed more services than simply drafting one request. Accordingly, the Court will overrule this objection.

Defendant objects to 67.6 hours billed by Ms. Dunne for time spent at trial and waiting for the jury to return its verdict on grounds that this time was duplicative because Mr. Blitz was also present during trial. The Court finds that Ms. Dunne's presence at trial was not duplicative and is compensable. The undersigned observed Ms. Dunne assisting Mr. Blitz during trial. Her presence appeared necessary. Therefore, the Court will overrule Defendant's objection.

Defendant objects to 33.1 hours billed for one paralegal and two attorneys to read and summarize the depositions of Plaintiff and her parents. (Pltf's Exh. B, p. 13-15; 20-21) In

absence of greater specificity regarding the summary of these depositions, the Court assumes that each attorney read and summarized the three depositions. As such conduct was duplicative, the Court will deduct twenty-two hours at a rate of $55.00 per hour from the award of legal fees.

Defendant also objects to several billing entries related to discovery. After review of these entries, the Court will overrule Defendant's objections.

Based on the foregoing, the Court awards Plaintiff legal fees as follows:

(1) Mr. Blitz: 198.5 at $150.00 per hour ($29,775.00)

(2) Ms. Dunne: 281.3 hours at $90.00 per hour ($25,317.00)

(3) Mr. O'Neal: 22.7 hours at $150.00 per hour ($3,405.00)

(4) Mr. Mitten: 9.4 hours at $150.00 per hour ($1,410.00)

(5) Ms. Besnia: .5 hours at $125.00 per hour ($62.50)

(6) Ms. Gunn: 74.4 hours at $90.00 per hour ($6,696.00)

(7) Mr. Sayad; 44 hours at $85.00 per hour ($3,740.00)

(8) Mr. O'Leary: 1.7 hours at $75.00 per hour ($127.50)

(9) Mr. Avery: 16.4 hours at $65.00 per hour ($1,066.00)

(10) Paralegals Jordan, Kister, Wall, Rallo, Pease, Swindle, and Gerard: 33.1 hours at $55.00 per hour ($1,820.50)

Accordingly, the Court will award Plaintiff $73,419.50 in attorneys' fees.

## III. Costs

On July 7, 1995, Plaintiff filed her Bill of Costs. Plaintiff seeks costs in the amount of $13,436.63. Plaintiff objects to Defendant's costs for expert witness fees, parking and mileage, computerized research, express delivery, witness fees, and photocopies.

### A. Expert Witness Fees

Plaintiff seeks $5,632.50 for "professional fees" associated with the services of Dr. Wolfgram. Defendant objects to this cost on grounds that it in not substantiated. In Plaintiff's reply in support of her bill of costs, Plaintiff submits two exhibits itemizing the costs associated with Dr. Wolfgram's participation in this matter. The Court finds that these records sufficiently substantiate Plaintiff's claim for $5,632.50 in costs for expert fees.[1] Accordingly, the Court overrules Defendant's objection.

1. In "Plaintiff's Reply in Support of Her Request for Costs and Supplemental Cost Request" Plaintiff seeks $6,339.00 in costs for fees paid

(Cont'd)

*Appendix B*

**B. Parking and Mileage**

Plaintiff seeks $71.00 for local mileage and $7.87 in parking. Plaintiff's mileage and parking are not taxable costs. *See Roche v. City of Normandy*, 566 F. Supp. 37, 42 (E.D. Mo. 1983) Accordingly, the Court will not tax these costs.

**C. Computerized Research**

In her bill of costs, Plaintiff seeks $333.62 for computerized legal research. In "Plaintiff's Reply in Support of Her Request for Costs and Supplemental Cost Request," Plaintiff withdraws her request for such costs. Accordingly, the Court will not tax such costs.

**D. Express Delivery**

Plaintiff seeks $83.60 for an "express delivery" fee. Plaintiff has not submitted any records indicating the purpose for the express delivery. Therefore, the Court cannot determine the reasonableness of this cost. Accordingly, the court will not tax the express delivery fee.

**E. Witness fees**

On her bill of costs, Plaintiff includes $500.00 in witness

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(Cont'd)

to Dr. Wolfgram. The records submitted in support of this claim, however, indicate that the fees paid Dr. Wolfgram total $6,169.00. Regardless, Plaintiff's Bill of Costs seeks expert fees in the amount of $5,632.50. Plaintiff has not filed an amended Bill of Costs or sought leave to do so. Accordingly, the Court declines to award an amount for expert fees in excess of $5,632.50, the amount listed on Plaintiff's Bill of Costs.

fees for Dr. Wolfgram. Defendant objects to this cost as unreasonable. In "Plaintiff's Reply in Support of Her Request for Costs and Supplemental Cost Request," Plaintiff withdraws her request for such costs. Accordingly, the Court will not tax such costs.

**F. Photocopies**

Defendant seeks recovery of copying costs in the amount of $1,767.86. Copying costs are only taxable when necessarily incurred. 28 U. S. C. § 1920; *Cruse v. KFC Corp.*, 768 F.2d 230, 234-35 (8th Cir. 1985). Plaintiff has failed to itemize her copying expenses, therefore, the Court will deny recovery of these costs because it is not possible for the Court to determine to what extent such costs were necessarily incurred and to what extent they were incurred for the convenience of counsel. Additionally, in so far as Plaintiff's copying costs appear to be for "routine copying expenses for duplication of pleadings and for general legal research," the Court will not tax these costs. *Stevens v. Zenith Distributing Corp. of Kansas*, No. 78-0477-CV-W-6, 1984 WL 21983,* 7 (W.D.Mo. 1984). Accordingly, Defendant's costs for copying will not be taxed.

Based on the foregoing, Defendant's Bill of Costs in the amount of $13,436.63 shall be reduced by a total of $2,763.95. In Accordance with the foregoing,

**IT IS HEREBY ORDERED** that Defendant's Motion for Judgment as a Matter of Law [docket # 120] is **DENIED.**

**IT IS FURTHER ORDERED** that Plaintiff's Motion for an Award of Attorneys' Fees and Expenses [docket # 119] is **GRANTED** in part and **DENIED** in part.

*Appendix B*

**IT IS FURTHER ORDERED** that Plaintiff is awarded $73,419.50 in attorneys' fees. An appropriate Judgement on Attorneys' Fees will accompany this order.

**IT IS FURTHER ORDERED** that Defendant's Objections to Plaintiff's Bill of Costs [docket #127] are **SUSTAINED** in part and **OVERRULED** in part.

**IT IS FURTHER ORDERED** that costs shall be taxed against Defendant in the amount of $10,672.68.

Dated this 23rd day of August, 1995.

s/ Jean C. Hamilton
UNITED STATES DISTRICT JUDGE

## APPENDIX C — JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MISSOURI FILED JUNE 23, 1995

**UNITED STATES DISTRICT COURT**
EASTERN DISTRICT OF MISSOURI

CASE NUMBER: 4:93cv663JCH

LISA VARNER

Plaintiff(s),

v.

NATIONAL SUPER MARKETS, INC.

Defendant(s).

**JUDGMENT IN A CIVIL CASE**

☒ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

* * *

**IT IS HEREBY ORDERED AND ADJUDGED** that on the Missouri Human Rights Act claim of plaintiff Lisa Varner, judgment is entered on behalf of plaintiff and against defendant National Supermarkets, Inc.

**IT IS FURTHER ORDERED AND ADJUDGED** that on the Federal Civil Rights Act claim of plaintiff Lisa Varner, judgment is entered on behalf of plaintiff and against defendant National Supermarkets, Inc.

*Appendix C*

**IT IS FURTHER ORDERED AND ADJUDGED** that damages be awarded to plaintiff Lisa Varner in the amount of $30,000 together with interest at the rate of 5.53% and costs.

Robert D. St. Vrain
CLERK

June 23, 1995
DATE

By: s/ C. Lippold
C. Lippold
DEPUTY CLERK

# APPENDIX D — EXCERPTS OF COLLECTIVE BARGAINING AGREEMENT EFFECTIVE JUNE 19, 1988 THROUGH JUNE 15, 1991

AGREEMENT

BETWEEN

NATIONAL SUPER MARKETS, INC.

ST. LOUIS

AND

UNITED FOOD AND COMMERCIAL WORKERS UNION

LOCAL NO. 655

ST. LOUIS, MISSOURI

---

EFFECTIVE

June 19, 1988

THROUGH

June 15, 1991

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*Appendix D*

[1] AGREEMENT

This Agreement, mutually entered into by and between National Super Markets, Inc., St. Louis, and/or successors and assigns, a signatory hereto, hereinafter referred to as the "Employer", and the United Food and Commercial Workers Union Local No. 655, chartered by the United Food and Commercial Workers International Union, AFL-CIO-CLC, hereinafter referred to as the "Union".

It is the intent and purpose of the parties hereto, by entering into this Agreement, to promote and to improve industrial and economic relationships between the Employer and their employees, to recognize mutual interests, to provide a channel through which information and problems can be transmitted from one to another, to formulate rules to govern the relationship between the Union and the Employer, and to promote efficiency and service. These objectives shall guide the parties and be observed by them during the term of this Agreement.

WITNESSETH: That the parties have agreed and do, by these presents, agree as follows.

ARTICLE 1. JURISDICTION

1.1 The Union shall be the sole and exclusive bargaining agent of all employees as defined in this Agreement in the City of St. Louis and in the counties of St. Louis, Franklin, St. Charles, Jefferson, Washington, Warren and Lincoln, excluding Store Managers, the legal owner (who shall be determined by mutual agreement between the Union and the Employer), supervisory and other employees as defined by the

*Appendix D*

National Labor Relations Act, as amended, and those employees covered by other collective bargaining agreements with the Employer.

1.2 All work and services connected with all operations carried on at the premises of the Employer's retail establishments including, but not limited to, the handling and selling of all merchandise, shall be performed only by employees within the unit as defined in this Agreement, and by employees working for the first thirty-one (31) days of their employment; provided, however, that the foregoing restriction on work jurisdiction may be altered or relaxed in whole or in party by mutual agreement between the Employer and the Union.

1.3 Under no condition shall supervisors or Store Managers perform bargaining unit work, except in case of emergency, such as Acts of God or other conditions beyond the control of the Employer, and to the extent that they may perform customer services. Customer services shall not be construed to include stocking, price marking, truck unloading or building displays, or any other bargaining unit work on a regular basis.

[2] 1.4 As of the effective date of this Agreement, the above described restriction on work jurisdiction has been, by mutual agreement between the Union and the Employer, relaxed and altered in the following respect; that vendors entering the said retail establishment for the purpose of delivering bread, milk, and potato chips may service their product line. The Greeting Card Department may be serviced by their respective vendors.

Any work done by any person outside of the bargaining unit in violation of this Agreement after it has once been

brought to the attention of management shall result in the employee on duty who reports the violation receiving pay for the time worked at the top clerk rate in the contract, or the employee's regular rate, whichever is the greatest, in addition to his normal pay for that day. This shall not preclude the Union representative of the local Union from filing a grievance pertaining to a violation of this paragraph in the name of a particular employee who shall be compensated in the method herein provided above.

Once a violation of any work done by any person outside of the bargaining unit has once been brought to the attention of Management; any other violations within a two (2) week time period by the same person shall result in the employee on duty who reports the violation receiving pay for the time worked at the top clerk rate in the contract, or the employee's regular rate, whichever is greater, in addition to his normal pay for that day.

ARTICLE 2. UNION SECURITY

2.1 All employees who are now members of the Union shall, as a condition of employment, maintain membership in good standing consistent with the provisions of the Labor-Management Relations Act of 1947, as amended.

The Employer shall not be required to discharge an employee for failure to attain or maintain membership in the Union unless it shall have received three (3) days' written notice from the Union prior to the date such discharge is to be effective.

2.2 All new employees must become members of the Union

thirty-one (31) days after their employment date and thereafter shall, as a condition of employment, maintain membership in good standing consistent with the provisions of the Labor-Management Relations Act of 1947, as amended.

CHECKOFF. The Employer agrees to deduct initiation fees, Union dues and uniform assessments where lawful, uniformly required as a condition of acquiring or maintaining membership in the Union from the wages of each employee, present and future, as the same shall be due, provided each such employee executes written authorization therefore, in a form authorized by law, and such authorization is turned over to the Employer.

[3] The Employer agrees to remit such dues and initiation fees as deducted to the Union.

The Union shall, on or before the tenth (10th) day of each month, furnish to the Employer a list of member-employees and the amounts due therefore, including dues owing for the succeeding month.

The Employer shall, on or before the last day of the same month, deduct and remit such dues as authorized to the Union.

The Employer will deduct Union dues and initiation fees on a weekly basis. The Employer shall, on or before the tenth (10th) day of the following month, remit such dues as authorized to the Union.

In the event no wages are then due the employee, or, are insufficient to cover the required deduction, it shall be the

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responsibility of the Union to re-submit the amount due on the next regular monthly billing.

Once each month, the Employer will submit to the Union a list of employees hired the previous month. The list will include the employees' names, social security numbers, store codes, job codes, and dates of hire.

Once each year, the Employer will deduct from the pay of the employees, who have certified in writing, a political deduction. The Union shall furnish to the Employer the amounts to be deducted on the regular monthly billing.

2.3 No employee shall be deprived of membership in the Union except in accordance with the Constitution and By-Laws of the Union.

2.4 The Employer and/or its agents or representatives agree not to aid, promote or finance any other group or organization which purports to engage in collective bargaining.

2.5 The Employer and the Union agree that there shall be no discrimination against any employee on account of Union activities or affiliation, or because of race, religion, color, creed, national origin, sex or age in accordance with existing law. Where the word "he" appears in this Agreement, the parties agree that it applies to both "male and female" employees.

2.6 The Employer agrees not to enter into any agreement or contract with their employees, individually or collectively which, in any way, conflicts with the terms and provisions of this Agreement.

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2.7 The Employer agrees to permit an authorized representative or officer of the Union to have free access to the stores at all hours when members of Local No. 655 are on duty to [4] satisfy the Union that the terms of this Agreement are complied with, but such representative or officer shall not interfere with the duties of any of the said employees or the business of the Employer.

The Union shall have the right to designate a Union steward and assistant Union steward for each store who shall have top ranking seniority (during the term of their office), irrespective of actual length of service, in case of layoffs and transfers.

2.8 The Union store card may be displayed in all places where members of Local No. 655 are employed exclusively. The store card shall be removed at the request of the Union.

2.9 Members of the Union must wear their Union buttons when on duty.

2.10 Corrective action initiated as a result of investigative shopping reports will be taken within five (5) scheduled working days. All other corrective action will be taken within a reasonable period of time.

Correction action will be discussed in the presence of the employee and, if requested, the Union Steward or the Business Agent or another bargaining unit employee. The employee and the Union will be given a copy of the "Corrective Action".

Work rules and regulations which apply to bargaining

unit employees and changes thereafter will be given to the Union.

## ARTICLE 3. MANAGEMENT RIGHTS

The management of the business and the direction of the working forces, including the right to plan, direct and control store operations, hire, suspend or discharge for proper cause, transfer or relieve employees from duty because of lack of work or for other legitimate reasons, the right to study or introduce new or improved production methods or facilities and the right to establish and maintain reasonable rules and regulations covering the operation of the stores, a violation of which shall be among the causes for discharge, are vested in the Employer; provided, however, that their right shall be exercised with due regard for the rights of the employees and provided further that it will not be used for the purpose of discrimination against any employee. This paragraph is subject to the Grievance Procedure.

## ARTICLE 4. GRIEVANCES AND ARBITRATION

4.1 Should any differences, disputes or complaints arise over the interpretation or application of the contents of this Agreement, there shall be an earnest effort made on the part of both parties to settle same promptly through the following steps:

[5] Step 1. By conference between the aggrieved employee, the Union Stewart of business representative, or both, and the Store Manager or owner. Store Management shall make its decision known within two (2)

working days thereafter. If the matter is not resolved in Step 1, it shall be referred to Step 2 within two (2) working days.

Step 2. By conference between the business representative and the owner or a supervisor of the Employer. The Employer shall make its decision known within three (3) working days thereafter. If the matter is not resolved in Step 2, it shall be reduced to writing and referred within three (3) working days to step 3.

Step 3. By conference between an official or officials of the Union and a designated representative of the Employer.

Step 4. In the event the last step fails to settle the complaint, it shall be referred, within seven (7) working days, to arbitration.

4.2 In any case in which an employee is aggrieved and the Union promptly notifies the employee that it does not intend to request arbitration after the Step 3 meeting, the time for requesting arbitration shall be stayed pending the employee's exhaustion of internal Union appeals to the Union's Executive Board.

4.3 The Employer and the Union shall mutually agree to an impartial arbitrator to hear said arbitration case; however, if said arbitrator cannot be chosen within three (3) days, then the Federal Mediation and Conciliation Service will be requested to furnish a panel of seven (7) names from which the arbitrator

may be chosen. The arbitrator will be selected within seven (7) days after the receipt of the panel by both parties. The arbitrator may be chosen by alternatively striking names. The party striking first will be determined by the flip of a coin. The decision of the arbitrator shall be binding on both parties. The expenses of the arbitrator shall be paid for jointly.

Such arbitrator shall not be empowered to add to, detract from or alter the terms of this Agreement.

4.4 The Employer may, at any time, discharge any worker for proper cause. The Union or the employee may file a written complaint with the Employer within seven (7) days after the date of discharge, asserting that the discharge was improper. Such complaint must be taken up promptly. If the Employer and the [6] Union fail to agree within five (5) days, it shall be referred to arbitration. Should the arbitrator determine that it was an unfair discharge, the Employer shall abide by the decision of the arbitrator.

4.5 Grievances must be taken up promptly. No grievance will be considered, discussed, or become arbitrable which is presented later than seven (7) days after such has happened.

4.6 The Employer shall have the right to call a conference with a Union steward or officials of the Union for the purpose of discussing his grievance, criticisms or other problems.

4.7 Grievances will be discussed only through the outlined procedures; except that by mutual agreement between the Union and the Employer, the time limits may be waived.

4.8 There shall be no lockout or cessation of work pending the decision of the arbitrator.

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ARTICLE 5. UNION COOPERATION

5.1 The Union shall use its best efforts as a labor organization to enhance the interests of the Employer, as an employer of union labor.

5.2 The Union agrees to uphold the rules and regulations of the Employer with regard to punctual and steady attendance, proper and sufficient notification in case of necessary absence, conduct on the job, and all other reasonable rules and regulations established by the Employer.

5.3 The Union agrees to cooperate with the Employer in maintaining and improving safe working conditions and practices, in improving the cleanliness and good housekeeping of the stores, and in caring for equipment and machinery.

5.4 The Union recognizes the need for conservation and the elimination of waste and agrees to cooperate with the Employer in suggesting and practicing methods in the interest of conservation and waste elimination.

5.5 The Union recognizes the need for improved methods and output in the interest of the employees and the business and agrees to cooperate with the Employer in the installation of such methods, in suggesting improved methods, and in the education of its members in the necessity for such changes and improvements.

ARTICLE 6. UNAUTHORIZED ACTIVITIES

6.1 During the term hereof, the Union agrees that there shall be no strike or any interference with or interruption of the

normal conditions of the Employer's business. The Employer agrees there shall be no lockout.

[7] 6.2 The failure of any employee to cross or work behind a lawful, primary labor picket line which has been officially recognized by the St. Louis Labor Council and/or the United Food and Commercial Workers' International Union, AFL-CIO-CLC shall not constitute a violation of this Agreement.

6.3 The Employer and the Union mutually agree that in the event of an unauthorized strike or slowdown by an employee or employees that the Employer will not file or press suits for monetary damages against the Union. The Union agrees that it will immediately take every reasonable means to induce the employee or employees to return to their jobs or resume standard production. Should such employee or employees refuse to return to work or to resume normal production, the Employer may exercise whatever disciplinary action it deems proper against such employee or employees, including discharge, layoff, loss of seniority rights or other privileges granted employees under this Agreement or the Employer policy.

ARTICLE 7. HOURS AND WORKING CONDITIONS

7.1.A. The basic work week for all employees covered by this Agreement shall be forty (40) hours, to be worked in five (5) eight (8) hour shifts or four (4) ten (10) hour shifts, not necessarily consecutive. The work week shall be each Employer's seven day payroll period.

B. The regular work day for employees shall not exceed eight (8) consecutive hours per shift [or ten (10) consecutive

hours per shift for those employees scheduled to work four (4) ten (10) hour shifts] exclusive of an unpaid meal period.

C. All time worked in excess of forty (40) hours per week or eight (8) consecutive hours per shift [ten (10) consecutive hours per shift for employees working four (4) ten (10) hour shifts] shall be paid at the rate of time and one-half (1-1/2) the employees regular rate of pay. There shall be no pyramiding of overtime or premium pay.

D. Available schedules for full time employees of four (4) ten (10) hour shifts shall be on a voluntary basis in accordance with seniority and qualifications to perform the job. The Employer will ascertain the number of four (4) ten (10) hour schedules available by department; then determine the actual number to be scheduled by department based on the number of volunteers per department. At no time shall anyone be forced to work a four (4) ten (10) hour schedule.

E. Daily overtime shall be offered by seniority and job classification within the store among the employees present and qualified to do the work when the need for overtime arises. Scheduled overtime shall be offered by seniority to employees qualified to do the work within the store for the designated

* * *

[36] In the event of a second violation in the same store of the Employer within a six (6) month period (following the first violation), the Union may advise the Employer, in writing, that the classification of Courtesy Clerk in that store is terminated for a period of six (6) months; and that all employees in the Courtesy Clerk classification will be reclassified as of the first

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(1st) day of the next pay period to the appropriate clerk rate, and remain in this classification.

A violation is constituted when work, other than proper duties for Courtesy Clerk, is by the direction of Management and/or work that is done with Management's knowledge.

| | |
|---|---|
| FOR THE UNION:<br>United Food and Commercial Workers Union, Local No. 655 AFL-CIO-CLC | FOR THE EMPLOYER:<br>National Super Markets, Inc.<br>St. Louis |
| s/ Jack Valenti<br>Jack Valenti<br><br>President | s/ Robert J. Flacke<br>Robert J. Flacke<br>Vice President<br>Director of Human Resources |
| s/ William B. Campey | s/ Kevin J. Beckerle<br>Labor Relations Manager |
| Date: Aug. 30, 1988 | Date: Aug. 24, 1988 |

# APPENDIX E — EXCERPTS OF COLLECTIVE BARGAINING AGREEMENT EFFECTIVE JUNE 16, 1991 THROUGH JUNE 11, 1994

AGREEMENT

BETWEEN

NATIONAL SUPER MARKETS, INC.

ST. LOUIS

AND

UNITED FOOD AND COMMERCIAL WORKERS UNION

LOCAL NO. 655

ST. LOUIS, MISSOURI

---

EFFECTIVE

June 16, 1991

THROUGH

June 11, 1994

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[1] AGREEMENT

This Agreement, mutually entered into by and between National Super Markets, Inc., St. Louis, and/or successors and assigns, a signatory hereto, hereinafter referred to as the "Employer", and the United Food and Commercial Workers Union Local No. 655, chartered by the United Food and Commercial Workers International Union, AFL-CIO-CLC, hereinafter referred to as the "Union".

It is the intent and purpose of the parties hereto, by entering into this Agreement, to promote and to improve industrial and economic relationships between the Employer and their employees, to recognize mutual interests, to provide a channel through which information and problems can be transmitted from one to another, to formulate rules to govern the relationship between the Union and the Employer, and to promote efficiency and service. These objectives shall guide the parties and be observed by them during the term of this Agreement.

WITNESSETH: That the parties have agreed and do, by these presents, agree as follows.

ARTICLE 1. JURISDICTION

1.1 The Union shall be the sole and exclusive bargaining agent of all employees as defined in this Agreement in the city of St. Louis and in the counties of St. Louis, Franklin, St. Charles, Jefferson, Washington, Warren and Lincoln, excluding Store Managers, the legal owner (who shall be determined by mutual agreement between the Union and the Employer), supervisory and other employees as defined by the

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National Labor Relations Act, as amended, and those employees covered by other collective bargaining agreements with the Employer.

1.2 All work and services connected with all operations carried on at the premises of the Employer's retail establishments including, but not limited to, the handling and selling of all merchandise, shall be performed only by employees within the unit as defined in this Agreement, and by employees working for the first thirty-one (31) days of their employment; provided, however, that the foregoing restriction on work jurisdiction may be altered or relaxed in whole or in party by mutual agreement between the Employer and the Union.

[2] 1.3 Under no condition shall supervisors or Store Managers perform bargaining unit work, except in case of emergency, such as Acts of God or other conditions beyond the control of the Employer, and to the extent that they may perform customer services. Customer services shall not be construed to include stocking, price marking, truck unloading or building displays, or any other bargaining unit work on a regular basis.

1.4 As of June 16, 1991, the above described restriction on work jurisdiction has been, relaxed and altered in the following respect: that there shall be no restrictions on outside sales persons stocking commercial bakery products, milk, soda, cookies, crackers, snacks, and L'Eggs. The greeting card department may be serviced by their respective vendors. Outside sales persons, Store Management, and the employer's reset crew shall not be restricted from performing resets or rearrangements of any product once it has been initially stocked by bargaining unit employees. No present forty (40) hour

employee who is on the Full Time Seniority list as of 6/19/91 shall have their hours reduced by vendor stocking hours as a direct result of the expansion of vendor assistance.

Any work done by any person outside of the bargaining unit in violation of this Agreement after it has once been brought to the attention of management shall result in the employee on duty who reports the violation receiving pay for the time worked at the top clerk rate in the contract, or the employee's regular rate, whichever is the greatest, in addition to his/her normal pay for that day. This shall not preclude the Union Representative of the local Union from filing a grievance pertaining to a violation of this paragraph in the name of a particular employee who shall be compensated in the method herein provided above.

Once a violation of any work done by any person outside of the bargaining unit has once been brought to the attention of Management; any other violations within a two (2) week time period by the same person shall result in the employee on duty who reports the violation receiving pay for the time worked at the top clerk rate in the contract, or the employee's regular rate, whichever is greater, in addition to his/her normal pay for that day.

[3] ARTICLE 2. UNION SECURITY

2.1 All employees who are now members of the Union shall, as a condition of employment, maintain membership in good standing consistent with the provisions of the Labor-Management Relations Act of 1947, as amended.

The Employer shall not be required to discharge an

employee for failure to attain or maintain membership in the Union unless it shall have received three (3) days written notice from the Union prior to the date such discharge is to be effective.

2.2 All new employees must become members of the Union thirty-one (31) days after their employment date and thereafter shall, as a condition of employment, maintain membership in good standing consistent with the provisions of the Labor-Management Relations Act of 1947, as amended.

CHECKOFF. The Employer agrees to deduct initiation fees, Union dues and uniform assessments where lawful, uniformly required as a condition of acquiring or maintaining membership in the Union from the wages of each employee, present and future, as the same shall be due, provided each such employee executes written authorization therefore, in a form authorized by law, and such authorization is turned over to the Employer.

The Employer agrees to remit such dues and initiation fees as deducted to the Union.

The Union shall, on or before the tenth (10th) day of each month, furnish to the Employer a list of member-employees and the amounts due therefore, including dues owing for the succeeding month.

The Employer shall, on or before the last day of the same month, deduct and remit such dues as authorized to the Union.

The Employer will deduct Union dues and initiation

fees on a weekly basis. The Employer shall, on or before the tenth (10th) day of the following month, remit such dues as authorized to the Union.

In the event no wages are then due the employee, or, are insufficient to cover the required deduction, it shall be the responsibility of the Union to re-submit the amount due on the next regular monthly billing.

Once each month, the Employer will submit to the Union a list of employees hired the previous month. The list will include the employees' names, social security numbers, store codes, job codes, and dates of hire.

[4] Once each year, the Employer will deduct from the pay of the employees, who have certified in writing, a political deduction. The Union shall furnish to the Employer the amounts to be deducted on the regular monthly billing.

2.3 No employee shall be deprived of membership in the Union except in accordance with the Constitution and By-Laws of the Union.

2.4 The Employer and/or its agents or representatives agree not to aid, promote or finance any other group or organization which purports to engage in collective bargaining.

2.5 The Employer and the Union agree that there shall be no discrimination against any employee on account of Union activities or affiliation, or because of race, religion, color, creed, national origin, sex or age in accordance with existing law. Where the word "he" appears in this Agreement, the parties agree that it applies to both "male and female" employees.

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2.6 The Employer agrees not to enter into any agreement or contract with their employees, individually or collectively which, in any way, conflicts with the terms and provisions of this Agreement.

2.7 The Employer agrees to permit an authorized representative or officer of the Union to have free access to the stores at all hours when members of Local No. 655 are on duty to satisfy the Union that the terms of this Agreement are complied with, but such representative or officer shall not interfere with the duties of any of the said employees or the business of the Employer.

The Union shall have the right to designate a Union steward and assistant Union steward for each store who shall have top ranking seniority (during the term of their office), irrespective of actual length of service, in case of layoffs and transfers.

2.8 The Union store card may be displayed in all places where members of Local No. 655 are employed exclusively. The store card shall be removed at the request of the Union.

2.9 Members of the Union must wear their Union buttons when on duty.

[5] 2.10 Corrective action initiated as a result of investigative shopping reports will be taken within five (5) scheduled working days. All other corrective action will be taken within a reasonable period of time.

Corrective action will be discussed in the presence of the employee and, if requested, the Union Steward or the

Business Agent or another bargaining unit employee. The employee and the Union will be given a copy of the "Corrective Action".

Work rules and regulations which apply to bargaining unit employees and changes thereafter will be given to the Union.

## ARTICLE 3. MANAGEMENT RIGHTS

The management of the business and the direction of the working forces, including the right to plan, direct and control store operations, hire, suspend or discharge for proper cause, transfer or relieve employees from duty because of lack of work or for other legitimate reasons, the right to study or introduce new or improved production methods or facilities and the right to establish and maintain reasonable rules and regulations covering the operation of the stores, a violation of which shall be among the causes for discharge, are vested in the Employer; provided, however, that their right shall be exercised with due regard for the rights of the employees and provided further that it will not be used for the purpose of discrimination against any employee. This paragraph is subject to the Grievance Procedure.

## ARTICLE 4. GRIEVANCES AND ARBITRATION

4.1 Should any differences, disputes or complaints arise over the interpretation or application of the contents of this Agreement, there shall be an earnest effort made on the part of both parties to settle same promptly through the following steps:

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Step 1. By conference between the aggrieved employee, the Union Stewart of business representative, or both, and the Store Manager or owner. Store Management shall make its decision known within two (2) working days thereafter. If the matter is not resolved in Step 1, it shall be referred to Step 2 within two (2) working days.

[6] Step 2. By conference between the Business Representative and the owner or a supervisor of the Employer. The Employer shall make its decision known within three (3) working days thereafter. If the matter is not resolved in Step 2, it shall be reduced to writing and referred within three (3) working days to step 3.

Step 3. By conference between an official or officials of the Union and a designated representative of the Employer.

Step 4. In the event the last step fails to settle the complaint, it shall be referred, within seven (7) working days, to arbitration.

4.2 In any case in which an employee is aggrieved and the Union promptly notifies the employee that it does not intend to request arbitration after the Step 3 meeting, the time for requesting arbitration shall be stayed pending the employee's exhaustion of internal Union appeals to the Union's Executive Board.

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4.3 The Employer and the Union shall mutually agree to an impartial arbitrator to hear said arbitration case; however, if said arbitrator cannot be chosen within three (3) days, then the Federal Mediation and Conciliation Service will be requested to furnish a panel of seven (7) names from which the arbitrator may be chosen. The arbitrator will be selected within seven (7) days after the receipt of the panel by both parties. The arbitrator may be chosen by alternatively striking names. The party striking first will be determined by the flip of a coin. The decision of the arbitrator shall be binding on both parties. The expenses of the arbitrator shall be paid for jointly.

Such arbitrator shall not be empowered to add to, detract from or alter the terms of this Agreement.

4.4 The Employer may, at any time, discharge any employee for proper cause. The Union or the employee may file a written complaint with the Employer within seven (7) days after the date of discharge, asserting that the discharge was improper. Such complaint must be taken up promptly. If the Employer and the Union fail to agree within five (5) days, it shall be referred to arbitration. Should the arbitrator determine that it was an unfair discharge, the Employer shall abide by the decision of the arbitrator.

[7] 4.5 Grievances must be taken up promptly. No grievance will be considered, discussed, or become arbitrable which is presented later than seven (7) days after such has happened.

4.6 The Employer shall have the right to call a conference with a Union Steward or officials of the Union for the purpose of discussing his/her grievance, criticisms or other problems.

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4.7 Grievances will be discussed only through the outlined procedures; except that by mutual agreement between the Union and the Employer, the time limits may be waived.

4.8 There shall be no lockout or cessation of work pending the decision of the arbitrator.

ARTICLE 5. UNION COOPERATION

5.1 The Union shall use its best efforts as a labor organization to enhance the interests of the Employer, as an employer of union labor.

5.2 The Union agrees to uphold the rules and regulations of the Employer with regard to punctual and steady attendance, proper and sufficient notification in case of necessary absence, conduct on the job, and all other reasonable rules and regulations established by the Employer.

5.3 The Union agrees to cooperate with the Employer in maintaining and improving safe working conditions and practices, in improving the cleanliness and good housekeeping of the stores, and in caring for equipment and machinery.

5.4 The Union recognizes the need for conservation and the elimination of waste and agrees to cooperate with the Employer in suggesting and practicing methods in the interest of conservation and waste elimination.

5.5 The Union recognizes the need for improved methods and output in the interest of the employees and the business and agrees to cooperate with the Employer in the installation of such methods, in suggesting improved methods, and in the

education of its members in the necessity for such changes and improvements.

ARTICLE 6. UNAUTHORIZED ACTIVITIES

6.1 During the term hereof, the Union agrees that there shall be no strike or any interference with or interruption of the normal conditions of the Employer's business. The Employer agrees there shall be no lockout.

* * *

[37] It is further provided that any improvements, changes or amendments, unless otherwise provided for in the new Agreement, shall become effective on the day following the expiration date of the old Agreement provided there has not been a work stoppage.

| FOR THE UNION: | FOR THE EMPLOYER: |
|---|---|
| United Food and Commercial Workers Union, Local 655 AFL-CIO-CLC | National Super Markets, Inc. St. Louis |
| s/ William B. Campey | s/ Kevin J. Beckerle |
| William B. Campey | Kevin J. Beckerle |
| President | Director, Labor Relations |
| Dated: | Dated: Sept. 13, 1991 |

## APPENDIX F — EXCERPTS OF EMPLOYEE HANDBOOK

### Your Handbook

### Welcome

### NATIONAL St. Louis

### YOUR CAREER AT NATIONAL, A GOOD PLACE TO SHOP . . . A GOOD PLACE TO WORK

National was founded in the spirit of friendliness and cooperation. Today, that spirit remains as a valuable tradition that makes working here rewarding and pleasant.

Good working relationships are achieved through understanding and initial good will. Your Handbook has been prepared to make working relationships better for all of us. It outlines what you can expect from your Company, and what your Company expects from you.

Each statement of policy contained in this handbook has a sound background based on experience. Your comments and suggestions for improvements in future editions are welcome.

Welcome to National — enjoy your work, your surroundings, your associates, and your Company.

Harold Seitz
President

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**HARASSMENT**

It is an established policy of National Super Markets, Inc. that sexual harassment by and of itself will not be tolerated. This policy applies to everyone, both supervisory and non-supervisory, and prohibits sexual harassment in any form, including verbal and physical harassment. Individuals who believe they have been sexually harassed by a co-worker or supervisor should promptly call the Human Resources Department.

* * *

## APPENDIX G — ASSOCIATE ACCEPTANCE RECORD

**NATIONAL**

HUMAN RESOURCES DEPARTMENT REV. 9/90

**NATIONAL**

**ASSOCIATE ACCEPTANCE RECORD**

I have received a copy of:

— WELCOME HANDBOOK

— CHEMICAL SAFETY HANDBOOK

— PERSONAL APPEARANCE STANDARDS

These outline the benefits, policies, procedures and associates' responsibilities for the organization. I will familiarize myself with this information and seek verification or clarification where necessary, and will comply with the policies and procedures pertaining to the facility in which I am employed. I understand that my employment may be terminated, with or without notice, by the company for legitimate business reasons, including lack of work, unsatisfactory performance, improper behavior or any other reason which, in the sole judgment of the Company, constitutes a basis for termination of employment. I further understand that no representative of National, other than the President or Director of Human Resources, has any authority to enter into any agreement for employment for any specified period of time or to make any arrangement contrary to the foregoing.

Should I leave the employment of National, I agree to return

*Appendix G*

my uniform to my store. If I fail to do so, I authorize National to deduct from my paycheck the current assessed value.

The information I have received is subject to change as situations warrant and I understand that the changes in the policies may supercede, modify or eliminate the policies summarized. Changes in policy will be communicated to me by my supervisor or through official notices on bulletin boards. I accept responsibility for keeping informed of these changes.

Lisa Varner
NAME (Please Print)

10-10-90
DATE

s/ Lisa Varner
SIGNATURE

16
STORE NO.

RETURN TO THE HUMAN RESOURCES
DEPARTMENT IMMEDIATELY

## APPENDIX H — SEXUAL HARASSMENT POLICY REISSUED AUGUST 16, 1990

**NATIONAL POLICY**

Reissued August 16, 1990

Sexual Harassment Policy

It is an established policy of National Super Markets, Inc. that sexual harassment by and of its employees is unacceptable and will not be tolerated. This policy applies to all employees, both supervisory and non-supervisory, and prohibits sexual harassment in any form, including verbal and physical harassment.

Sexual harassment includes, but is not limited to, making unwanted sexual advances and requests for sexual favors where either:

(1) submission to such conduct is made an explicit or implicit term or condition of employment;

(2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual; or

(3) such conduct has the purpose or affect of substantially interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

Any employee who believes he/she has been sexually harassed by a co-worker or supervisor should promptly report

*Appendix H*

**the facts of the incident to either Carol Schone of the Training Department or Roger Beckman of the Labor Relations Department, either may be reached at 731-5511. A confidential investigation of any complaint will be undertaken and if the complaint is determined to be valid, the offender will be subject to disciplinary action up to and including termination.**

**—PLEASE POST—**

*Appendix H*

August 16, 1990

Procedures for Handling Sexual Harassment Complaint

1. Any supervisor who is notified of a complaint regarding sexual harassment, should immediately direct the complaintant to Carol Schone or Roger Beckman.

2. Ms. Schone or Mr. Beckman will meet with the complaintant to discuss the situation and to determine if further investigation is warranted.

3. If the investigator believes the situation warrants it, a formal confidential investigation will be undertaken. All pertinent witnesses will be interviewed by the investigator to determine the facts of the situation.

4. The complaint and facts from the investigation will be presented to the Director of Labor Relations, the Director of Store Operations and the Division Counsel for review and decisions as to what, if any, action should be taken.

5. The investigator will inform the complaintant of the Company's decision within fourteen days of their initial meeting with the complaintant.

6. If the complaintant is not satisfied with the Company's response, they will have one week from the date they are notified of the Company's decision to request a review of the case before the Director of Labor Relations.

7. All complaintants will be given a copy of the above procedures at the initial meeting between themselves and the investigator.

## APPENDIX I — SEXUAL HARASSMENT POLICY REISSUED JANUARY 1, 1991

**NATIONAL** **POLICY**

Reissued 1/1/91

Sexual Harassment Policy

It is an established policy of National Super Markets, Inc. that sexual harassment by and of its employees is unacceptable and will not be tolerated. This policy applies to all employees, both supervisory and non-supervisory, and prohibits sexual harassment in any form, including verbal and physical harassment.

Sexual harassment includes, but is not limited to, making unwanted sexual advances and requests for sexual favors where either:

(1) submission to such conduct is made an explicit or implicit term or condition of employment;

(2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual; or

(3) such conduct has the purpose or affect of substantially interfering with an individual's work performace or creating an intimidating, hostile, or offensive working environment.

Any employee who believes he/she has been sexually

harassed by a co-worker or supervisor should promptly report the facts of the incident to either Carol Schone of the Training Department or Roger Beckman of the Labor Relations Department, either may be reached at 731-5511. A confidential investigation of any complaint will be undertaken and if the complaint is determined to be valid, the offender will be subject to disciplinary action up to and including termination.

—PLEASE POST—

*Appendix I*

01/01/91

Procedures for Handling Sexual Harassment Complaint

Do NOT Post

1. Any supervisor who is notified of a complaint regarding sexual harassment, should immediately direct the complaintant to Carol Schone or Roger Beckman.

2. Ms. Schone or Mr. Beckman will meet with the complaintant to discuss the situation and to determine if further investigation is warranted.

3. If the investigator believes the situation warrants it, a formal confidential investigation will be undertaken. All pertinent witnesses will be interviewed by the investigator to determine the facts of the situation.

4. The complaint and facts from the investigation will be presented to the Director of Labor Relations, the Director of Store Operations and the Division Counsel for review and decision as to what, if any, action should be taken.

5. The investigator will inform the complaintant of the Company's decision within fourteen days of their initial meeting with the complaintant.

6. If the complaintant is not satisfied with the Company's response, they will have one week from the date they are notified of the Company's decision to request a review of the case before the Director of Labor Relations.

*Appendix I*

7. All complaintants will be given a copy of the above procedures at the initial meeting between themselves and the investigator.

## APPENDIX J — RELEVANT STATUTES

**Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1) and (2):**

**§ 2000e-2. Unlawful employment practices**

**(a) Employer practices**

It shall be unlawful employment practice for an employer —

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

* * *

*Appendix J*

**Civil Rights Act of 1991, 42 U.S.C. § 2000 E-2, Pub. L. 102-166, 105 Stat. 1071:**

> Where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including settlement negotiations, conciliation, facilitation, mediation, factfinding, minitrials, and arbitration, is encouraged to resolve disputes arising under the Acts or provisions of Federal law amended by this title.

**Labor Management Relations Act, 1947, 29 U.S.C. § 158(d):**

> (d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party . . .
>
> * * *

*Appendix J*

**Labor Management Relations Act, 1947, 29 U.S.C. § 171(a) and (c):**

**§ 171. Declaration of purpose and policy**

It is the policy of the United States that —

(a) sound and stable industrial peace and the advancement of the general welfare, health, and safety of the Nation and of the best interests of employers and employees can most satisfactorily be secured by the settlement of issues between employers and employees through the processes of conference and collective bargaining between employers and the representatives of their employees:

* * *

(c) certain controversies which arise between parties to collective bargaining agreements may be avoided or minimized by making available full and adequate governmental facilities for furnishing assistance to employers and the representatives of their employees in formulating for inclusion within such agreements provision for adequate notice of any proposed changes in the terms of such agreements, for the final adjustment of grievances or questions regarding the application or interpretation of such

agreements, and other provisions designed to prevent the subsequent arising of such controversies.

June 23, 1947, c. 120, Title II, § 201, 61 Stat. 152.

**Labor Management Relations Act, 1947, 29 U.S.C. § 173(d):**

**§ 173. Functions of Service**

* * *

**Use of conciliation and mediation services as last resort.**

(d) Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement. The Service is directed to make its conciliation and mediation services available in the settlement of such grievance disputes only as a last resort and in exceptional cases.

June 23, 1947, c. 120, Title II, § 203, 61 Stat. 153.

(2)

No. 96-802

S... U.S.
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DEC 23 1996
CLERK

In The

# Supreme Court of the United States

October Term, 1996

LISA ANNE VARNER,

*Respondent,*

*vs.*

NATIONAL SUPER MARKETS, INC.,

*Petitioner.*

*On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit*

## RESPONDENT'S BRIEF IN OPPOSITION

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**APPENDIX**

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## STATEMENT OF THE CASE

### A. Procedural Background

Respondent Lisa Anne Varner ("Varner") claimed and the jury found that her then employer, Petitioner National Super Markets, Inc. ("National"), is liable to Varner under the Missouri Human Rights Act, Mo. Rev. Stat. §§ 213.010-137 (1994) (Count II of the Petition), and the Civil Rights Acts of 1964 and 1991, 42 U.S.C. §§ 2000e-2000e-17 (1994) (Count III of the Petition), for sexual harassment of Varner by a co-employee, Robert Paul Edmiston ("Edmiston"). The jury awarded Varner $30,000.00 in actual damages. (Petitioner's Appendix (hereinafter referred to as "Pet. App." 26a-27a). The district court entered judgment on the verdict on June 23, 1995, and on August 23, 1995, denied National's Motion for Judgment as a Matter of Law Pursuant to Rule 50 of the Federal Rules of Civil Procedure. (Pet. App. 26a-27a). The Eighth Circuit Court of Appeals affirmed the judgment of the trial court on September 9, 1996. (Pet. App. 1a-11a).

## STATEMENT OF THE FACTS

### A. Reports of Harassment

For this Court's consideration of whether it should issue a writ of certiorari, the details of the harassing acts themselves are not relevant. Varner's testimony concerning the nature of the four sexual comments and gestures made to her, and the nature of the two instances of offensive touching by Edmiston in late July, 1991, and on November 22, 1991, were uncontradicted at trial. Additionally, National did not dispute at trial that Varner contacted Christopher Pilch ("Pilch"), her boyfriend and co-employee at National, and advised him of each of the physical touching incidents immediately upon arriving home after work. Upon concluding his discussions with Varner

on both occasions Pilch telephoned Curtis Mason, the Store Manager at the Sierra Vista store where Varner, Edmiston and Pilch were employed, and reported the incidents involving Varner and Edmiston.

Rather, the factual disputes at trial centered upon the content of Pilch's report to Mason concerning the late July incident and Mason's responses to both reports. Pilch testified he told Mason of a physical touching. Mason testified, however, that Pilch had "merely" reported an "off-color remark." Pilch testified that Mason responded on both occasions that Varner "had to report the incidents to him and he could possibly say something to Edmiston and the condition could get worse or he could just let it alone and maybe Edmiston would forget about it." Mason testified he responded to both of Pilch's reports by advising Pilch to inform Varner to report to Roger Beckman in Human Resources.

It is further undisputed that Mason did not discuss the claims with Varner, did not confront Edmiston at any time, or inform anyone of Pilch's telephone calls until after Edmiston's arrest. It is undisputed that Varner did not personally talk to Roger Beckman or anyone else in National's upper management, nor did she file a grievance with the union. However, Varner did file charges of discrimination with the Equal Employment Opportunity Commission ("EEOC") and the Missouri Commission on Human Rights and such charges were served upon National.

Thus, National's repeated assertions in its Petition for Writ of Certiorari that Varner "chose" not to inform National of Edmiston's ongoing alleged harassment (pp. 2, 3 and 9, 25, 27 and 28), is misleading, and takes Varner's testimony out of context.

**B. The Collective Bargaining Agreements**

It is undisputed that during the time period in which the sexual harassment of Varner occurred, there was a Collective Bargaining Agreement ("CBA") in effect between National and United Food and Commercial Workers Local 655 ("Local 655"). The first CBA was in effect from June 19, 1988 through June 15, 1991, and the second CBA was in effect from June 16, 1991 through June 11, 1994. Portions of these CBA's are reprinted in the Appendix to the Petition for Writ of Certiorari. (Pet. App. 28a-57a). Varner became a member of the Local 655 and subject to the terms of the collective bargaining agreement thirty-one days after her date of hire because of the closed shop provisions of the collective bargaining agreement itself.

National quoted from portions of the CBAs in its Statement of the Case and those portions will not be recited again. Additional references to portions of National's CBAs will be discussed in connection with Varner's arguments for denial of the writ.

With regard to the trial testimony concerning the CBAs, Varner points out the following perceived omissions from National's statement of the case. The testimony of the shop stewards concerning the grievance and arbitration of sexual harassment claims was not as clear on the subject as National suggests. For example, Carol Wiessler, a shop steward testified on direct examination that as a shop steward, "sexual discrimination was an issue in which she could become involved." Nevertheless, on redirect examination, Wiessler was unable to state that discrimination claims were subject to the CBA until National's counsel lead her to that conclusion.

Further, the rank and file employees who testified on the subject disavowed knowledge that such claims were subject to

the CBA. Rather, as witness Patrick McCorkle testified, he never read the CBA, perhaps flipped through it and may have discussed the CBA with other employees on the topic of "maybe pay more than anything." Similarly, Pilch testified he had grieved a wage dispute under the CBAs. Varner was not asked questions concerning the specific contents of the CBAs.

**C. The Sexual Harassment Policy**

It is undisputed that during the occurrences National had a sexual harassment policy. (Pet. App. 67a-70a). The version (reissued 1/1/91) in effect during the relevant time period consisted of two sections. The first section outlined the prohibition against sexual harassment and required an employee who believed that he or she had been sexually harassed to promptly report the incident to Carol Schone of the Training Department or Roger Beckman of Human Resources. (Pet. App. 67a-70a). The first section of the policy contained the instruction "Please Post." The second section of the policy outlined the procedures for handling complaints. (Pet. App. 69a-70a). Under these procedures, a supervisor who is notified of a complaint regarding sexual harassment was to immediately direct the complainant to Carol Schone or Roger Beckman. (Pet. App. 69a). The January 1, 1991, version of the procedures contained the instruction "Do NOT Post." (Pet. App. 69a).

Mason testified at trial that under the procedures, he, as a store manager, could not take any action upon receipt of a complaint of sexual harassment. National's Director of Human Resources and Labor Relations who drafted the policy testified that he "did not want his managers going and investigating complaints that may be made."

Despite the "posting instructions" contained on the policy, there was a dispute in the evidence as to whether National's

sexual harassment policy was posted, and if posted, whether it was placed in a binder along with numerous policies or placed on a bulletin board along with OSHA policies, wedding invitations, "thank you" notes and union information.

The trial testimony revealed that National never sponsored meetings or seminars concerning sexual harassment for the nonsupervisory employees. According to Mason, he and the store managers had attended a seminar in which the issue of sexual harassment was one of several topics discussed, but he never held employee meetings concerning the sexual harassment policy or sexual harassment in general.

It is not disputed, that at the time she was hired, Varner was given an Employee Handbook. (Pet. App. 58a-61a). When shown the handbook at trial, Varner agreed the version of the Employee Handbook given to her contained a reference to National's sexual harassment policy.

## REASONS FOR DENYING THE WRIT

### I.

### THIS COURT SHOULD NOT ISSUE THIS WRIT BECAUSE ANY DECISION ON THE FEDERAL LAW QUESTIONS WILL HAVE NO IMPACT ON THE JUDGMENT OF THE DISTRICT COURT, AND THIS COURT HAS RECENTLY DECLINED TO ENTERTAIN THE SAME ISSUES RAISED BY NATIONAL IN ANOTHER PETITION.

The jury's verdict and the judgment of the district court were in favor of Varner on her claims under both the Missouri Human Rights Act and the Federal Civil Rights Act. The Eighth Circuit Court of Appeals affirmed the judgment as to both claims.

However, in its Petition for Writ of Certiorari, National confined the Questions Presented and its analysis of those questions to issues exclusively under federal law. Consequently, even if this Court were to grant certiorari and resolve the issues raised by National in its favor, the Court's opinion would not have any effect on the verdict for Varner under the Missouri Human Rights Act. Moreover, the arguments raised by National under the federal statutes and presented here for review, would find no favor with respect to the Missouri Human Rights Act. *See, e.g. Green v. City of St. Louis*, 870 S.W. 2d 794, 796 (Mo. banc 1994) (Exhaustion of other available administrative remedies is not required before filing suit under the Missouri Human Rights Act).

The Court's opinion as to the federal issues in essence would be merely advisory as they would not be altering the ultimate outcome in this case. For this reason, the Petition for Writ of Certiorari should be denied.

Moreover, this Court was recently presented with the occasion to take Certiorari on this precise issue in the case of *Austin v. Owens-Brockway Glass Container, Inc.*, 78 F.3d 875 (4th Cir. 1996) Docket No. 96-337, filed August 28, 1996. The opinion of the Eighth Circuit Court of Appeals in this case was brought to the attention of the Court in the Brief of Respondent filed in *Austin*. The Court denied certiorari in that case and should do so in this case.

## II.

## THE LANGUAGE AND HISTORY OF THE CIVIL RIGHTS ACTS OF 1964 (AS AMENDED) AND 1991 DO NOT MANDATE EXHAUSTION OF EITHER THE GRIEVANCE AND ARBITRATION PROCEDURES OF A COLLECTIVE BARGAINING AGREEMENT OR AN EMPLOYER'S INTERNAL GRIEVANCE PROCEDURE.

This Court should deny certiorari as to both questions presented by National because the Civil Rights Acts do not mandate the exhaustion of grievance and arbitration procedures of collective bargaining agreements nor the procedures of an employer's sexual harassment policy as a prerequisite to filing a lawsuit in federal court. The only express prerequisites to filing a civil suit under Title VII are the filing of a charge of discrimination with the EEOC and receipt of a notice of right to sue. 42 U.S.C. §§ 2000e-5(c), (d) and (e).

National relies in part on § 118 of the Civil Rights Act of 1991, 42 U.S.C.A. § 2000e-2 (1994), Pub L. 102-166, 105 Stat. 1071, in support of its argument that this Court should grant certiorari. (Petition for Writ of Certiorari at 14-15). Section 118 of the Civil Rights Act of 1991, even when given the most liberal construction, does not mandate exhaustion of grievance and arbitration procedures under a CBA or an employer's sexual harassment policy.

In addition, the House Committee on Education and Labor, when passing upon the bill which became the 1991 Civil Rights Act, emphasized:

> the use of alternative dispute resolution is intended to *supplement, not supplant*, the remedies provided by Title VII. Thus, for

> example, the Committee believes that any agreement to submit disputed issues to arbitration, whether in the context of a collective bargaining agreement or in an employment contract, does not preclude the affected person from seeking relief under the enforcement provisions of Title VII.

H.R. Rep. No. 40 (I) 102d Cong. 1st Sess. 97 (*reprinted in* 1991 U.S.C.C.A.N. 549, 635 (emphasis added)).

Earlier House Committee Reports concerning § 118 also recognized the "voluntary" use of alternative dispute mechanisms. H.R. Conf. Rep. No. 596, 101st Cong., 2d Sess. 89 (1990) (*reprinted* in 1990 U.S.C.C.A.N. 565, 598).

The House Committee position recited above is echoed in its position on the exhaustion of internal employer grievance procedures. The Committee rejected the "Republican substitute" which would have required exhaustion of an employer's grievance procedure. In explaining its rationale for rejecting an amendment to the civil rights act, the committee stated,

> for the first time under Title VII the availability of a remedy would be conditional on a victim filing a complaint with his or her employer in addition to filing a complaint with a neutral, administrative enforcement agency. If a harassment victim failed to comply with every technicality of an employer's complaint procedure, the Republican substitute provided that "no unlawful employment practice shall be found to have occurred." That rule would apply *even if* a court finds undisputed evidence or

> egregious harassment and concludes that using the employer's complaint procedure would be futile. Moreover, the Republican substitute's vague wording would permit a court to bar a harassment victim's Title VII claim if he or she had not used the employer's internal complaint mechanism within ninety days of the harassment. Such a rule would in effect punish the victim . . .

H.R. Rep. No. 40(I), 102d Cong., 1st Sess. 103 (1991) (*reprinted in* 1991 U.S.C.C.A.N. 549, 641).

Thus, the Questions Presented by National have been considered by Congress and plainly rejected. Accordingly, this Court should deny certiorari for the language and history of this legislation does not support the position of National.

## III.

## TWENTY YEARS OF SUPREME COURT PRECEDENT HOLDS THAT A CLAIMANT IS NOT REQUIRED TO GRIEVE AND ARBITRATE HER TITLE VII CLAIM PURSUANT TO A COLLECTIVE BARGAINING AGREEMENT.

The Court should deny certiorari as to Petitioner's question concerning the exhaustion of collective bargaining remedies because this Court has previously resolved the issue in *Alexander v. Gardner-Denver Company*, 415 U.S. 36, 94 S. Ct. 1011, 39 L. Ed. 2d 147 (1974). Justice Powell delivered a unanimous opinion of the Court in *Gardner-Denver*, and pointed out that "final responsibility for enforcement of Title VII is vested with federal courts." 415 U.S. at 44, 94 S. Ct. at 1018. The Court further stated that Congress had specified "with precision the

jurisdictional prerequisites that an individual must satisfy before he is entitled to institute a lawsuit. In the present case, these prerequisites were met when Petitioner (1) filed a timely charge of employment discrimination with the Commission, and (2) received and acted upon the Commissioner's statutory notice of the right to sue." (citing 42 U.S.C. §§ 2000e-5(b),(e) and (f) (further cites omitted)) 415 U.S. at 47, 94 S. Ct. at 1019. The express holding of the Supreme Court in *Alexander v. Gardner-Denver Company*, is that a claimant is not foreclosed from instituting a lawsuit in federal court under Title VII by reason of prior submission of his claim to final arbitration. 415 U.S. at 49, 59 and 60, 94 S. Ct. at 1020, 1024 and 1025.

The continued vitality of *Gardner-Denver* is recognized in *Livadas v. Bradshaw*, __ U.S. __, 114 S. Ct. 2068 (1994); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 111 S. Ct. 1647, 114 L. Ed. 2d 26 (1991); *Atchison, Topeka and Santa Fe Ry. Co. v. Buell*, 480 U.S. 557, 107 S. Ct. 1410, 94 L. Ed. 2d 563 (1987); *McDonald v. City of West Branch, Michigan*, 466 U.S. 284, 104 S. Ct. 1799, 80 L. Ed. 2d 302 (1984); *Barrentine v. Arkansas-Best Freight Systems, Inc.*, 450 U.S. 728, 101 S. Ct. 1437, 67 L. Ed. 2d 641 (1981).

National attempts to distinguish *Gardner-Denver* from the instant case on the grounds that in *Gardner-Denver* the claimant had exhausted the arbitration procedures under the CBA, whereas in this case Varner did not file a grievance or submit to arbitration. This factual distinction is without merit: Since *Gardner-Denver*, various Courts of Appeals have interpreted *Gardner-Denver* to extend to cover the situation at issue in this case, that is, failure to exhaust grievance and arbitration procedures of a CBA does not preclude the institution of a lawsuit under federal statutes. *See Tran v. Tran*, 54 F.3d 115, 116, n. 2 117 (2d Cir. 1995); *Ryan v. City of Shawnee*, 13 F.3d 345, 347 (10th Cir. 1993); *EEOC v. Board of Governors*, 957 F.2d 424, 431 (7th Cir. 1992).

Moreover, the Supreme Court implicitly recognized that *Gardner-Denver* could be extended to the situation in which a claimant had not arbitrated the issue. In *Atchison, Topeka and Santa Fe Ry. Co. v. Buell*, the Court stated: "The Court on numerous occasions, declined to hold that individual employees are, *because of the availability of arbitration*, barred from bringing claims under federal statutes" 480 U.S. 557, 565, 107 S. Ct. 1410, 1415, 94 L. Ed. 2d 563 (1987) (citing *Barrentine and Gardner-Denver*) (emphasis added). The Court noted that there was a collective bargaining agreement between the railroad and the employee's union and that such agreement included an arbitration provision. This Court then concluded that the claimant was not precluded from bringing his FELA claim by reason of the Railway Labor Act.

Likewise, in *Livadas v. Bradshaw*, __ U.S. __, 114 S. Ct. 2068 (1994), the Court appeared to accept the extension of *Gardner-Denver* to situations in which the claimant had failed to file a grievance concerning statutory rights. In *Livadas*, the claimant had not filed a grievance under the collective bargaining agreement concerning the state wage statute at issue in the case. Yet, after considerable discussion, including a reference to *Gardner-Denver*, this Court concluded the plaintiff could proceed with her claim under 42 U.S.C. § 1983. 114 S. Ct. at 2080 n.21.

In conclusion, both Supreme Court and Court of Appeals precedent has established that a claimant is not foreclosed from pursuing federal statutory claims in federal court despite the existence of a grievance and arbitration procedure in a collective bargaining agreement. Certiorari would be inappropriate in this case because the matter has been well settled by the courts and this case presents no new issue for determination by this Court.

## IV.

## NATIONAL'S ALLEGED CONFLICT BETWEEN THE EIGHTH AND THE FOURTH CIRCUIT IS NONEXISTENT BECAUSE THE *AUSTIN* DECISION ERRONEOUSLY APPLIED SUPREME COURT PRECEDENT AND BECAUSE THERE ARE SIGNIFICANT FACTUAL DIFFERENCES BETWEEN THE COLLECTIVE BARGAINING AGREEMENTS AT ISSUE IN EACH CASE WHICH SUPPORT THE CONCLUSIONS REACHED BY THE RESPECTIVE COURTS.

There is no conflict between the decision in *Austin v. Owens-Brockway Glass Container Corp.*, 78 F.3d 875 (4th Cir. 1996), and the decision by the Eighth Circuit because the Fourth Circuit erred by issuing a decision contrary to Supreme Court precedent and such a decision should not be viewed as creating a conflict justifying certiorari.

In relying upon *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 111 S. Ct. 1647, 114 L. Ed. 2d 26 (1991), the Fourth Circuit held in *Austin* that the plaintiff's failure to submit her claims to mandatory arbitration as required under the collective bargaining agreement, barred her from pursuing claims under Title VII and the Americans With Disabilities Act. This Court in *Gilmer* held that private, individual agreements to arbitrate all employment related claims could be enforced to include actions under the Age Discrimination in Employment Act. However, the Fourth Circuit ignored the crucial distinction the Court in *Gilmer* drew between private individual agreements and collective bargaining agreements. Quoting from *Gardner-Denver*, this Court in *Gilmer* stated:

> [I]n submitting his grievance to arbitration,

> an employee seeks to vindicate his contractual right under a collective-bargaining agreement. By contrast, in filing a lawsuit under Title VII, an employee asserts independent statutory rights accorded by Congress. The distinctly separate nature of these contractual and statutory rights is not vitiated merely because both were violated as a result of the same factual occurrence.

*Gilmer*, 500 U.S. at 34, 111 S. Ct. at 1565. (citing *Alexander v. Gardner-Denver*, 415 U.S. at 49-50, 94 S. Ct. at 1020).

The Court in *Gilmer* continued: "[W]e further expressed concern that in collective-bargaining arbitration the interests of the individual employee may be subordinated to the collective interests of all employees in the bargaining unit." *Gilmer*, 500 U.S. at 34, 111 S. Ct. at 1656 (citing *Gardner-Denver*, 415 U.S. at 58, n. 19, 94 S. Ct. at 1024, n. 19).

The Court in *Gilmer* then explained that in *Gardner-Denver* and its progeny, "[a]n important concern therefore was the tension between collective representation and individual statutory rights, a concern not applicable to the present case." 500 U.S. at 35, 111 S. Ct. at 1657. The Fourth Circuit ignored the Supreme Court's distinction in *Gilmer*, between collective bargaining and individual statutory rights and consequently misapplied *Gilmer*.

In addition, the Fourth Circuit misinterpreted § 118 of the Civil Rights Act of 1991 as evidencing congressional intent to mandate arbitration, by ignoring the fact that Congress in § 118 merely "encouraged" arbitration. The Fourth Circuit made reference to the House Committee Conference Reports but dismissed them as "unclear". The Fourth Circuit also ignored

the fact that Congress did not change or amend the enforcement provisions or the prerequisites for federal suit set forth in 42 U.S.C. § 2000e-5 (1994) to include exhaustion of remedies under a CBA.

Because the Fourth Circuit in *Austin* erred in issuing a ruling contrary to Supreme Court precedent, any purported conflict engendered by such a decision can be disregarded, for only the Supreme Court may overrule one of its precedents. *See Thurston Motor Lines Inc. v. Jordan K. Rand Ltd.*, 460 U.S. 534, 535 (1983). Accordingly, certiorari should be denied for there is no conflict between the circuits on the issue.

Furthermore, there are significant distinctions between the *Austin* collective bargaining agreement and those at issue in this case. The *Austin* collective bargaining agreement contained "Article 38" which was expressly entitled "Fair Employment Practice and Equal Opportunities." Article 38 states:

> 1. The Company and the Union *will comply with all laws preventing discrimination* against any employee because of race, color, religion, sex, national origin, age, handicap, or veteran status.
>
> 2. *This Contract shall be administered in accordance with the applicable provisions of the Americans with Disabilities Act. Before taking action relative to this Section*, the Company will meet with the Local Union, and both parties will have sufficient opportunity to express their opinions regarding an anticipated action.
>
> 3. *Any disputes under this Article as with*

> *all other Articles of this Contract shall be subject to the grievance procedure.*

(Emphasis added). *Austin*, 78 F.3d at 879-880.

In contrast, Article 2 of the CBA between National and Local 655 does not contain similar express language mandating use of the grievance procedure for discrimination claims. Although Section 2.5 entitled "Union Security", reflects the agreement between Local 655 and National that there shall be no discrimination on the basis of sex and contains the phrase "in accordance with existing law", it does not contain any reference to the grievance and arbitration procedure, or make specific reference to Title VII, the Americans with Disabilities Act or other anti-discrimination laws. Moreover, the "existing law at the time of National's first relevant CBA included this Court's decision in *Gardner-Denver.* At the time of the second relevant CBA, the "existing law" included the 1991 Civil Rights Act, merely "encouraging" alternative means of dispute resolution and this Court's opinion in *Gilmer* reaffirming *Gardner-Denver*. Unlike Article 38, Section 2.5 is not set out in a separate article or entitled in such a fashion as to indicate it intends to discuss equal opportunities. In fact, Section 2.5 is buried among other provisions in Article 2 concerning such matters as union membership, the wearing of union buttons and the like. A reasonable construction of the Union Security provision is what it says: the employer agrees not to interfere with the Union and the rights of the employees to collectively organize. Thus, Article 2 and particularly Section 2.5, does not put union members on notice that their Title VII claims are subject to collective bargaining agreement remedies.

Article 3 of each of National's CBAs is entitled "management rights". The obvious focus of Article 3 is the power

of management to plan, direct and control store operations without union interference. Although Article 3, unlike Section 2.5, references the grievance procedure, Article 3 similarly fails to notify union members that their Title VII claims are subject to the grievance and arbitration procedure.

None of the other sections of National's collective bargaining agreement cited by National in its Petition for Writ of Certiorari expressly reference the "laws preventing discrimination", or indicate that statutory claims are subject to the grievance and arbitration procedures. Furthermore, Section 4.3 of National's collective bargaining agreements provided that the arbitrator "shall not be empowered to add to, detract from or alter the terms of this agreement." (Pet. App. 39a, 55a). As the Court in *Gardner-Denver* stated:

> Arbitral procedures, while well suited to the resolution of contractual disputes, make arbitration a comparatively inappropriate forum for resolution of rights created by Title VII. This conclusion rests first on the special role of the arbitrator, whose task is to effectuate the intent of the parties rather than the requirements of enacted legislation. Where the collective bargaining agreement conflicts with Title VII, the arbitrator must follow the agreement.

*Gardner-Denver*, 415 U.S. at 56-57, 94 S. Ct. 1011 at 1024. Section 4.3 expressly limits the arbitrator to the terms of the contract, thus, the arbitrator does not have the authority to resolve statutory claims because the specific provisions of Title VII and other antidiscrimination laws were not made part of the collective bargaining agreements. The contrary argument could be made with respect to Article 38 of the *Austin* collective bargaining agreement and the Fourth Circuit so held.

Therefore, the only "conflict" between *Austin* and the instant case is a factual conflict upon which the different outcomes can be explained. For this additional reason, certiorari is not appropriate in this case.

## V.

## THIS COURT NEED NOT CLARIFY ITS DECISION IN *MERITOR V. VINSON* AS NATIONAL WAS ALLOWED TO INTRODUCE EVIDENCE AND ARGUE ITS POSITION AT THE TRIAL COURT, AND NATIONAL'S PETITION MERELY RAISES A SUFFICIENCY OF THE EVIDENCE ARGUMENT.

National seeks this Court to reconsider its decision in *Meritor Savings Bank FSB v. Vinson*, 477 U.S. 57, 106 S. Ct. 2399, 91 L. Ed. 2d 49 (1986). In *Meritor*, this Court declined to specify the precise contents of an employer's anti-discrimination policy that would shield the employer from liability. Instead the Court instructed the lower courts to look to agency principles when deciding employer liability. The Court's implicit rationale in doing so was to avoid drawing bright line rules which could result in unfairness to either the employer or the employee, and to provide flexibility to the courts in resolving the issue by reference to the well established common law. Thus, in *Meritor*, the Court expressly rejected the Court of Appeal's bright line declaration that an employer is automatically liable for sexual harassment practiced by its supervisors. 477 U.S. at 72, 106 S. Ct. at 2408. Likewise the court rejected the notion that a grievance procedure will automatically shield the employer from liability. *Id.* Specifically, the Supreme Court in *Meritor* stated with regard to the existence of a grievance procedure and a policy against discrimination, coupled with the failure of the claimant to invoke that procedure:

> [W]hile those facts are plainly relevant, the situation before us demonstrates why they are not necessarily dispositive.

*Meritor*, 477 U.S. at 72, 106 S. Ct. at 2408. The Court then held, based on the facts of that case, that Meritor Savings Bank's procedure was ineffective because it required reporting to the supervisor, who was the harasser. *Id.*

*Meritor* provides ample guidance to the lower courts to use the familiar principles of agency when deciding employer liability. As to when a sexual harassment policy is sufficient to shield an employer from liability, the Court in *Meritor* indicates that such analysis is a fact dependent inquiry.

*Meritor* clearly provided sufficient guidance to the district court in this case. National presented to the jury substantial evidence concerning the effectiveness of its sexual harassment policy. Moreover, at National's request, and over the objection of Varner, the trial court instructed the jury as follows:

> Defendant National Super Markets, Inc. is not liable to Plaintiff, if you believe:
>
> > First, defendant had a written sexual harassment policy; and
> >
> > Second, the sexual harassment policy was calculated to encourage employees subjected to sexual harassment to follow its provisions;
> >
> > Third, Plaintiff Lisa Varner failed to follow its provisions.

(Resp. App. 4a).

The instruction was based on the language of *Meritor*. Thus, National was able to present evidence and argue to the jury its position based on *Meritor*. Although National now may find the jury's determination, that National's sexual harassment policy was ineffective to absolve it of liability, unacceptable, such is not a reason to justify the grant of certiorari in this case.

In essence, National is asking this Court to find that the jury's verdict is erroneous because in National's opinion it is against the weight of the evidence. However, National never made the challenge below and should not be able to do so here. Therefore, this Court should deny certiorari on this issue.

## VI.

## NATIONAL SUGGESTS THERE IS A CONFLICT BETWEEN THE EIGHTH CIRCUIT'S OPINION IN THIS CASE AND THE THIRD CIRCUIT'S OPINION IN *BOUTON V. BMW OF NORTH AMERICA, INC.*; HOWEVER, THE ONLY "CONFLICT" IS THE OUTCOME IN EACH CASE WHICH IS DUE TO THE DIFFERENCES IN THE FACTS OF EACH CASE.

Review of the Third Circuit's decision in *Bouton v. BMW of North America, Inc.*, 29 F.3d 103 (3rd Cir. 1994), reveals that it is not in conflict with the Eighth Circuit's opinion in this case. Rather, the conclusion that the employer is not liable in *Bouton* was predicated upon the specific facts of that case which are distinguishable from the facts in this case.

In *Bouton*, the facts revealed Bouton knew of the employer's sexual harassment policy, that the policy was well advertised, and that she had used it effectively in the past. 29 F.3d at 109-110. In this case, there was a factual dispute as to whether Varner knew of the specific reporting procedures of National's sexual

harassment policy, whether Varner had seen it or read it until her deposition, whether the policy was posted and, if so, how it was posted. Moreover, there was no evidence Varner had ever used the policy before. In *Bouton*, the evidence showed the employer took prompt remedial action in response to Bouton's first complaint of sexual harassment by granting her request for a transfer even though it found her complaint uncorroborated. 29 F.3d at 107-108. In this case, sufficient evidence showed that no action was taken in response to Pilch's complaint of sexual harassment of Varner to Mason.

Thus, the different results in each case were due to the different facts in each case. Consequently, there is no conflict between the circuits justifying certiorari.

## VII.

## NATIONAL SUGGESTS THAT VARIOUS COURTS HAVE INTERPRETED *MERITOR* DIFFERENTLY AND THEREFORE, THIS COURT SHOULD CLARIFY THE HOLDING IN *MERITOR*; HOWEVER, REVIEW OF EACH OF THE CASES CITED BY NATIONAL REVEALS THAT THE COURTS DID NOT INTERPRET *MERITOR* DIFFERENTLY BUT RATHER THE OUTCOME DIFFERED BECAUSE OF THE APPLICATION OF *MERITOR* TO THE SPECIFIC FACTS OF EACH CASE.

A review of the cases cited by National indicate no legal variance in the interpretation of the *Meritor* decision. In *Gary v. Long*, 59 F.3d 1391 (D.C. Cir. 1995)[1], the court concluded that the employer was not liable for the sexual harassment of

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1. There is a typographical error in the citation to *Gary v. Long* contained in the Petition for Writ of Certiorari at p. vii and 28. The correct cite is set forth herein.

Gary by her supervisor because its sexual harassment policy was effective. The basis for the court's conclusion was that the employer had a sexual harassment policy that was well publicized, that Gary had conceded at oral argument that the employer's sexual harassment policy was adequate, and that the evidence showed prompt remedial action was taken in connection with Gary's complaint. 59 F.3d at 1398 and 1399. Thus, *Gary* is consistent with *Meritor*'s suggestion that an effective sexual harassment policy can shield an employer from liability. The different resolution between *Meritor* and *Gary* was due to the distinction between the facts of the two cases.

In *Jansen v. Packaging Company of America*, 895 F. Supp. 1053 (N.D. Ill. 1995), the court granted summary judgment in favor of the employer because, although it found that the employer had constructive knowledge of the sexual harassment, the employer took reasonable and effective measures in response to the claimed sexual harassment. 895 F. Supp at 1064-1065. The court referred to Jansen's deposition testimony in which Jansen testified that she had not reported the supervisor's conduct earlier because she thought he would back off, but when she was pushed to the limits she just walked out and went to personnel. The court concluded on the basis of this testimony that Jansen "plainly knew she had some recourse at Packaging." 895 F.Supp at 1067. The court declined to consider the issue further because it found Jansen knew her supervisor had limited authority over her and that he did not have apparent authority to harass her. *Id.* at 1067. Thus, *Jansen* is likewise factually distinguishable from *Meritor* and such factual differences explain the difference in the outcome of the two cases.

The Ninth Circuit Court of Appeals rejected an argument of an employer that its nondiscrimination policy should shield it from liability in *Equal Opportunity Commission v. Hacienda Hotel*, 881 F.2d 1504 (9th Cir. 1989). In so doing, the court

relied on *Meritor*'s statement that the "mere existence of a grievance procedure and a policy against discrimination coupled with [an employee's] failure to invoke the procedure" does not necessarily insulate the employer from liability. 881 F.2d at 1516 (citing 477 U.S. at 72, 96 S. Ct. at 2408.) The court found Hacienda Hotel's nondiscrimination policy ineffective for the same reasons the Court in *Meritor* found the bank's policy to be ineffective. Both were general nondiscrimination policies and both required initial reporting to a supervisor who in both cases engaged in or condoned the harassment. *Id.*

Finally, in *Weaver v. Minnesota Valley Laboratories*, 470 N.W. 2d 131 (Minn. App. 1991), the Court rejected the claim the employee quit due to sexual harassment because it found under the facts of the case that the employer did not know nor should it have known of the sexual harassment. There, the facts revealed that no complaints amounting to sexual harassment were made by the claimant, or by anyone on his behalf, and the employee knew to whom he was to report such matters under the company policy for he had reported other matters to that individual. Thus, *Weaver* is likewise distinguishable from the facts in *Meritor*, for in *Meritor*, even though Vinson may have known to whom to report, the person to whom she was to report was the harasser, thus, the policy was not effective under that scenario.

In conclusion, this case is not appropriate for certiorari. Under *Meritor, Bouton, Gary, Hacienda Hotel, Jansen and Weaver*, the effectiveness of the sexual harassment policy involves consideration of all the facts in the case and the application of agency law to these facts. The fact finders in this case, after the presentation of voluminous evidence concerning the policy, found that National's sexual harassment policy was not reasonably calculated to encourage victims of discrimination to come forward. The Eighth Circuit affirmed that finding. Had

National been foreclosed from presenting evidence regarding the policy perhaps their Petition for Certiorari would be more compelling, but such is not the case. Therefore, certiorari should be denied.

## CONCLUSION

For the reasons stated more fully herein, National Super Market, Inc.'s Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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## APPENDIX A — RELEVANT STATUTES

Missouri Human Rights Act, Rev. Stat. Mo. §§ 213.055.1 and 213.111 (1994).

**§ 213.055 Unlawful employment practices.**

1. It shall be an unlawful employment practice:

(1) For an employer, because of the race, color, religion, national origin, sex, ancestry, age or handicap of any individual:

(a) To fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, national origin, sex, ancestry, age or handicap;

(b) To limit, segregate, or classify his employees or his employment applicants in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, national origin, sex, ancestry, age or handicap;

* * *

*Appendix A*

**§ 213.111 Right to civil action, when — relief available — costs and attorneys' fees, awarded when**

1. If, after one hundred eighty days from the filing of a complaint alleging an unlawful discriminatory practice, the commission has not completed its administrative processing and the person aggrieved so requests in writing, the commission shall issue to the person claiming to be aggrieved a letter indicating his[1] right to bring a civil action within ninety days of such notice against the respondent named in the complaint. Such an action may be brought in any circuit court in any county in which the unlawful discriminatory practice is alleged to have occurred, either before a circuit or associate circuit judge. Upon issuance of this notice, the commission shall terminate all proceedings relating to the complaint. No person may file or reinstate a complaint with the commission after the issuance of a notice under this section relating to the same practice or act. Any action brought in court under this section shall be filed within ninety days from the date of the commission's notification letter to the individual but no later than two years after the alleged cause occurred or its reasonable discovery by the alleged injured party.

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1. Revisor's note: Work "their" appears in original rolls.

*Appendix A*

2. The court may grant as relief, as it deems appropriate, any permanent or temporary injunction, temporary restraining order, or other order, and may award to the plaintiff actual and punitive damages, and may award court costs and reasonable attorney fees to the prevailing party, other than a state agency or commission or a local commission; except that, a prevailing respondent may be awarded court costs and reasonable attorney fees only upon a showing that the case is without foundation.

## APPENDIX B — JURY INSTRUCTION

### INSTRUCTION NO. 11

Defendant National Super Markets, Inc., is not liable to Plaintiff, if you believe:

First, defendant had a written Sexual Harassment Policy; and

Second, the Sexual Harassment Policy was calculated to encourage employees subjected to sexual harassment to follow its provisions, and;

Third, Plaintiff Lisa Anne Varner failed to follow its provisions.